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LAW COLLEGE

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THE USURIOUS LOANS BILL.

We believe there is little difference of opinion as to the necessity for empowering Courts to grant relief of the kind contemplated by this measure. But we have serious misgivings as to the degree of success likely to be achieved by the proposals in the bill now published. The days of *laissez faire* and freedom of contract have admittedly passed away. But the difficulty is how to secure uniformity and certainty in the exercise by courts of indefinite powers vested in them to relieve against the contracts of parties. The Legislature is not prepared to fix anything like a maximum rate of interest and we admit that that is scarcely desirable even if possible, for, it will certainly not be fair to fix a rate of interest without reference to the circumstances of particular transactions. It must also be recognised on the other hand that the Legislature may run the risk of defeating its own purpose if the new situation created is such that money lenders may be unduly deterred from advancing loans to needy persons of small means. It is therefore inevitable that some discretion must be left to Courts to fix the appropriate compensation that a creditor may be allowed in each particular case though even from reported cases one could see that the standard is apt to vary as with the proverbial Chancellor's foot.

Though based on S. 1 of the English Money Lenders' Act the bill attempts to facilitate the task of Courts in this country by furnishing in sub-clauses (a) to (d), of clause (2) certain standards and criteria by which to judge of the nature of the transaction in question and decide the measure of relief to be afforded. These to some extent meet some of the difficulties pointed out in the English cases dealing with the Money Lenders' Act. There is however one provision in the bill, which, in spite of the fact that it has the precedent of the English Act, seems to us inexpedient: we refer to

the provision empowering the court to order repayment of sums already received by the creditor. It is one thing to say that the courts should not help a creditor to enforce an unconscionable transaction, but a very different thing to invest the court with powers to enforce morality by compelling people to disgorge what they may have received by unfair means. If the court is to start on such a campaign of morality we do not know whether money lenders are the only persons to be so dealt with, for there are many other kinds of speculators who deserve to be brought under this kind of censorship. We cannot help feeling that borrowers, at any rate after they have borrowed, do not always behave in a manner that may command the sympathy of all and the proposed provision may put it in their power to harass their quondam creditors as much out of other motives as with a real sense of hardship suffered by themselves. There is nothing inherently immoral in a person receiving what he has stipulated for and the fact that the debtor has actually paid the amount may be taken as some indication both of his ability to pay and of his own feeling that the transaction was not grossly unfair. Further, the bill does not fix any period or other limit with reference to which the accounts of transactions between the parties are to be reopened and we do not know if any provision of the law of limitation will apply to fix a limit for the purpose. Dealing with the corresponding clause in the English Act, the Court of Appeal in *Saunders* v *Newbould*[1] held that in any particular proceeding only so much of the account between the parties must be reopened as may be 'relevant to the transaction in respect of which the suit is brought'; but they left the question open as to the propriety of opening up other settled accounts in other appropriate proceedings. In the House of Lords, the Lord Chancellor left this part of the decree of the Court of Appeal as it was. In India the Dekhan Agriculturists Relief Act provides for enquiry into 'the history of the case from the commencement of the transactions between the parties*** out of which the suit has arisen'; but that Act does not go the length of compelling a refund of sums received by the creditor (cf. *Janoji* v. *Janoji* [2], *Ramachandra Baba Sathi* v. *Janardan Apaji* [3] and *Mugappa* v. *Mahomed Saheb* [4]; but see, *Dhondi Bin Ranoji* v. *Revappa Satappa*[5]. It is conceivable that the money lender himself

1. (1905) L. R. 1 Ch 260
2. (1882) I. L. R. 7 B. 185.
3. (1889) I. L R 14 B. 19
4. (1909) I. L. R. 34 B. 260.
5. (1917) I. L. R. 41 B. 453

might have suffered losses or otherwise become reduced in circumstances and it would be a great hardship in such a case to call upon him to pay back moneys which he might have received and spent years ago. The law well knows cases in which a person is not allowed to enforce a transaction but is yet allowed to retain benefits received by him thereunder as *e.g.* voluntary payments in respect of barred debts, payments in respect of transactions declared void by S. 257 (A) of the Civil Procedure Code etc. and there is no morality in helping a person to go back upon a contract which he himself has chosen to perform. We would therefore strongly recommend the omission of the provision in question.

The Bill as it stands makes provision for the powers under it being exercised in any proceeding "for the recovery of a loan or for the enforcement of any agreement or security etc." This would confine the beneficent operation of the measure to cases in which the creditor comes forward as the *plaintiff* and the general provision in cl. (4) does not carry the matter any further, while clause (3) is confined to insolvency proceedings. We see no reason why the court should not be able to exercise the like powers in proceedings initiated by the debtor himself as *e.g.* in a suit for redemption, or even in special suits like those provided for in cl. (2) of S. 1 of the English Act and S. 3 of the Dekhan Agriculturists-Relief Act.

With reference to the local application of the measure, it seems to us undesirable to limit it to particular portions of the country. If in any locality the remedial powers conferred by the Act are not required because of the non-prevalence of the class of transactions meant to be struck at, the formal applicability of the Act to such locality would give rise to no serious trouble, whereas, if the Act is to be in force in one part of the country but not in an adjacent locality, it is bound to give rise to complications. Difficult questions may arise as to the law governing a particular transaction *viz*, whether it is the *lex fori* or the *lex loci contractus*. or (where the loan is secured on immoveable property) the *lex sitae*; it may also encourage unhealthy attempts at evading the law by one party or the other, by making it appear that the transaction was entered into in one place rather than in another and there is no reason or principle for discriminating

between contracts entered into in one locality and those entered into elsewhere. We would also recommend the omission of such words in cl. (2) as give the Act a retrospective operation in so far as there may be an agreement or security given *after* the Act though the loan itself might have been borrowed *before* the commencement of the Act. It is the contract of loan that must be the basis of the rights of the parties and if that is to be left unaffected by the later Act, there is no reason why the mere fact of security being taken after the Act, should involve a different result.

USURIOUS LOANS BILL.

Bill to give additional powers to Courts to deal in certain cases with usurious loan of money or grain.

Whereas it is expedient to give additional powers to courts to deal in certain cases with usurious loans of money or grain. It is hereby enacted as follows:—

Short title, extent and commencement.

1. (1) This Act may be called the Usurious Loans Act, 191 .

(2) It extends to the whole of British India.

(3) The Local Government may, by notification in the local official gazette, direct that it shall come into force in the whole or any part of the province from such date as it may specify in its notification.

Re-opening of transaction.

2. Where, in any proceeding, *ex parte* or otherwise, for the recovery of a loan whether of money or of grain made after the commencement of this Act, or for the enforcement of any agreement or security made or taken after the commencement of this Act, in respect of any such loan made either before or after the commencemnt of this Act, the Court is satisfied by evidence that the return to be made over and above what was actually lent, whether the same is charged or sought to be recovered specifically by way of interest or otherwise, is excessive, and the transaction was as between the parties thereto substantially unfair, the Court

may reopen the transaction and take an account between the parties; and may, notwithstanding any statement or settlement of account or any agreement purporting to close previous dealings and to create a new obligation, reopen any account already taken between them and relieve the debtor of all liability in respect of such excess, and if any such excess has been paid or returned or allowed in account, the court may order the creditor to repay any sum which the court considers to be repayable in respect thereof, and may set aside either wholly or in part or revise or alter any security given or agreement made in respect of any such loan, and if the creditor has parted with the security, may order him to indemnify the debtor in such manner and to such extent as the court may deem just.

(2) (a) In this section "excessive" means in excess of that which the court deems to be reasonable having regard to the risk incurred as it appeared or must be taken to have appeared to the creditor at the date of the loan and to the ordinary rate prevailing in the locality for loans of like character.

(b) In considering whether a return is excessive under this section the Court shall take into account any sums charged or paid for expenses, inquiries, fines, bonuses, premia, renewals, or any other charges, and if compound interest is charged, the periods at which it is calculated and the total advantage which the creditor may reasonably be taken to have expected from the transaction.

(c) In considering the question of risk the Court shall take into account the presence or absence of security and the value thereof, if any, the financial condition of the debtor and the result of any previous money transactions of the debtor so far as the same were known or must be taken to have been known to the creditor.

(*d*) In considering whether a transaction was substantially unfair the Court shall take into account all circumstances materially affecting the relations of the parties at the time of the loan or tending to show that the transaction was unfair, including the necessities or supposed necessities of the debtor at the time of the loan so far as the same were known or must be taken to have been known to the creditor and the rate of interest charged.

3. On any application relating to the admission or amount of a proof for money lent in any insolvency proceedings, the court may exercise the like powers as may be exercised under this section when proceedings are taken for the recovery of a money loan.

4. This section shall apply to any proceeding whatever its form may be, if such proceeding is substantially one for the enforcement of any agreement or security in respect of any such loan.

5. Nothing in this section shall affect the rights of any *bona fide* transferee or holder for value without notice.

6. Nothing in this section shall be construed as derogating from the existing powers or jurisdiction of any court.

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MALABAR LAW: INDIVIDUAL PROPERTY AND SUCCESSION.

As under the Hindu Law, so under the Marumakkathayam and Aliyasanthana systems joint holding is the rule and individual holding the exception and it is for the individual member who sets up separate title to make it out. *Mari Veetil Chathu Nair* v. *Mari Veetil Sekaran Nair* [1], *Virarayan* v. *Valia Rani of Pudia Kovilagam* [2], S. A. 970 of 1883, S. A. 1150 of 1883, *Govinda Panikker* v. *Nani* [3], *Thimmakka* v. *Parameshri* [4], *Dharnu Shetti* v. *Dejamma* [5]. The strength of the presumption would no doubt vary according to circumstances. A karnavan who is in possession of family funds, for instance, would be presumed to have made all his acquisitions with them for the benefit of the family and in his case the presumption would be very strong. (*Kallati Kunju Menon* v. *Palat Erracha Menon* [6], *Kunhanna* v. *Timmaju* [7]). The discussion as to a nucleus and the burden of proving its existence or the contrary is common to the ordinary Hindu Law and these systems and need not detain us. If it is proved that there was no family property from which the property in question could have been acquired, that undoubtedly would rebut the presumption of family acquisition but it is not sufficient to show that the family funds alone cannot account for the acquisition. *Thimmakka* v. *Parameshri* [4]. For it must be borne in mind that when there is a mixing up of the family funds and separate funds the presumption is that the latter is merged in the former. It may be guessed as under the Hindu Law that an inconsiderable contribution from the family funds will not affect the nature of the acquisition. It could not in those circumstances be said that the family property was

1. (1909) I. L. R. 33 M. 250.
2. (1881) I. L. R. 3 M. 141.
3. (1911) I. L. R. 36 M. 304 (footnote).
4. (1910) M. W. N. 297 = 7 I. C. 145.
5. (1916) 5 L. W. 259.
6. (1864) 2 M. H. C. R. 162.
7. (1914) 27 M. L. J. 60.

instrumental to the acquisition. (See Strange, Vol. 1, p. 213; *Lakshman Mayaram* v. *Jamnabai* [1]. As said in books of Hindu Law "things of ordinary value may be given up for they are mere chaff." (*de minimis non curat lex*); for instance in the practice of agriculture, it is said, taking a rope for his plough out of the common stock would not invalidate his pretensions to an exclusive right. Nor would the fact that the money is raised on the credit due to the relation of the manager to the family property be a reason for holding that the property acquired is family property. It would be otherwise if the amount is raised by pledging family property. A member of the family making improvements on the family property, *Kannan* v. *Tenju* [2], or raising crops on the family property, *Vishnu Nambudri* v. *Akkamma* [3], cannot of course claim them. They will be regarded as accretions to the family property; otherwise, if the lands are held on lease from the family. Acquisitions out of maintenance allowances or out of the income of the land allotted for that purpose should, we think, be similarly treated as self-acquisitions. The case may vary if it is only an improvement of the family property in his possession for maintenance for then the simple case would be complicated by the principle of merger.

Modern conditions are likely to raise more complicated problems. The following are some such. Suppose the managing member purchases property in his own name as self-acquisition or in the name of another intending to make a gift to that other partly with family funds and partly with his own funds? If the purchase is entirely with the family funds both according to the principles of Hindu law and of S. 63 of the Indian Trusts Act, the acquisition will enure for the benefit of the family, but in the case put, is the principle of S. 66 of the Trusts Act giving a charge to the family to be applied or should the property be held to belong to the family? Again, suppose the managing member starts a venture with the family funds and succeeds by expending his labour and skill in making it a big success; is the family to be entitled to the whole business or is it to be held entitled to the funds contributed with interest or corresponding profits at its option. Here again, at the time of starting the business the

1. (1882) I. L. R. 6 Bom. 225.

2. (1882) I. L. R. 5 M 1

3. (1913) I. L. R. 34 M. 496.

manager may have disclosed his intentions with regard to the business whether it should be his own private concern or that of the family or there may be circumstances from which his intention may be inferred. Among the circumstances pointing one way and the other would be his raising money by pledging the credit of the family, or on his own personal credit, treating the capital contributed by the family in the books of the business as capital or only as a loan, the nature of the investment whether authorised or unauthorised, participation of the family members in the conduct of the business &c. The managing member is not bound to contribute his labour, skill or capital for the benefit of the family but if he does not declare his intention to reserve the benefit for himself he will be presumed not to do so. If he declares his intention to reserve it, the capital he would certainly be entitled to have. *Thimmakka* v. *Akku* [1]. Whether he should have the improved fund for himself and whether he would be entitled to get the benefit of his labour and skill would depend upon circumstances. The test in such a case, we think, should be—what is substantially instrumental in the acquisition of the new property. If the capital is the main thing and the family has contributed it in spite of the declaration of the intention to charge for labour and skill we think the family should get the property. For, in the absence of a contract, the managing member would not be entitled to charge for his services and where the result of his services is not separable from the family fund, he cannot have any portion of the improved fund. But when his own capital forms the bulk or his labour and skill form the chief or main cause of the new fund, the family we think should only be entitled to the fund contributed with interest or proportionate profits at their option. In cases of doubt where it is difficult to say whether it is the capital or the skill that is the main cause, having regard to the fiduciary position of the Karnavan the family should have the benefit of the doubt. Where a deceased partner's share is continued to be used in the partnership, the rule followed is that the representatives are given at their option interest on the fund or the share of the profits that can appropriately be assigned to the capital contributed, proper deduction being made for the skill and labour of the surviving partners. The privileges and immunities attaching to the position of the managing member, we think, require that he

1. (1910) I. L. R. 34 M. 481.

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should not be permitted to get any remuneration for his services unless he is able to show that his labour and skill are the main causes of the acquisition. Applying the same principles, where the property is purchased out of a mixed fund and the family contribution forms the bulk, the family should have the benefit of the property and the member only a charge for his money.

The presumption above referred to applies equally strongly to junior members who are in joint or exclusive management of the family property or otherwise have the handling of the family funds. *Sanku* v. *Puthumma* [1], *Thimmakka* v. *Akku* [2], *Thimmakka* v. *Parameshri* [3]. In Travancore the presumption is that property standing in the name of the junior members belongs to them exclusively and the family has to show that they had management or handling of the family funds. *Kanaku Parameswaran Kesavan* v. *Govindan* [4], *Raman Govindan* v. *Parvathi* [5], *Narayanan Raman* v. *Govindan Kesavan* [6]. Here on the other hand, the presumption is stated to be the other way in a number of cases referred to at the beginning of the article. In *Govinda Panikker* v. *Nani* [7] Benson and Sundara Iyer, JJ., however state "We do not understand these cases as laying down that there is any presumption of law either way. The presumption is one of fact and whether a presumption in favour of the property being Tarward property should be drawn or not in any particular case would depend on various circumstances such as the relationship of the member in whose name the title stands to the karnavan at the time of the acquisition of the property in question, the possession of private means by the junior member, the existence of family funds at the time of the acquisition." In *Thimmakka* v. *Parameshri* [8], the learned Chief Justice is not prepared to say that the presumption is one of law. But it must be noticed that in the leading case on burden of proof, *Dhuram Das Pande v. Mussamut Shama Soondri Debia* [9], which has been followed by the Privy Council quite recently in *Parbati Dasi* v. *Baikunta Nath De* [10], the presumption is stated to be a presumption of law. There, Lord Campbell says :—It is allowed that this was a family who lived in commensality, eating together and possessing joint property. It is

1. (1890) I. L. R. 14 Mad. 289.
2. (1910) I. L. R. 34 Mad. 481.
3. (1910) M. W. N. 297.
4. 22 T. L. R. 121.
5. 22 T. L. R. 178.
6. 26 T. L. R. 190.
7. (1911) I. L. R. 36 M. 304.
8. (1910) M. W. N. 297.
9. (1843) 3 M. I. A. 229.
10. (1913) 26 M. L. J. 248.

allowed that they had some joint property and that there can be no doubt that under these circumstances, the presumption o law is that all the property they were in possession of was joint property until it was shown by evidence that one member of the family was possessed of separate property." In the latest case this is what their Lordships say—"there was no evidence that Rup Charan had any separate funds or that the properties in dispute were purchased with money belonging to him. In the absence of such evidence the presumption is clearly decisive that they were acquired by the father in the name of the son and that they were not the self-acquired properties of Rup Charan (junior member)." *Parvati Dasi* v. *Baikunta Nath De* [1]. Referring to this case and explaining *Govinda Panikker* v. *Nani* [2], Sir John Wallis, C. J. and Burn, J. say in *Dhurani Shetti* v. *Dejamma* [3] "we understand the learned Judges in *Govinda Panikker* v. *Nani* merely to lay down that the right way to approach the case is to look at all the facts and the circumstances of the particular case and raise the presumption accordingly.* * * The view of the Dt. Judge is opposed to the very recent decision of the Privy Council in *Parvati Dasi* v. *Baikunta NathDe* [4]". The view of the Dt.Judge based on *Govinda Panikker* v. *Nani* [2] which was dissented from was that there could not be any presumption that the properties were Tarward properties unless the particular member was shown to have no private means or the family was shown to have had funds which disappeared after the acquisition. In the absence of proof of nucleus the presumption would, of course, be of the most attenuated character but where a possible source of acquisition is proved, the effect of the Privy Council decision would seem to be to throw the onus on the junior member to show that he either had separate funds or that the property was purchased out of separate funds. He may perhaps also show that no family property was in his possession or that even if it was, it was too insignificant to have substantially contributed to the acquisition. In the case of the karnavan, a higher degree of proof than mere possession of separate funds, we think, should be required. The ratio of the presumption in the case of the junior member is traced in *Virarayan* v. *Valia Rani of Pudia Kovilagam* [4] in effect to the general practice of handing over the management of portions of family property to junior members. As a point of history, it may have deeper roots.

1. (1913) 26 M. L. J. 248.
2. (1911) I. L. R 36 M. 304.
3. (1911) 5 L. W. 229.
4. (1881) I. L. R. 3 M. 141.

The old theory referred to in Manu of son's wife and slaves being Nirdhanas (i. e. without property) and their property belonging to the head of the family may be the real source of it. It will be seen that the karnavan's position, and even the history of its evolution present many analogies to that of the father under the Hindu Law. If at all, the authority of the karnavan is not less but more absolute than that of the father.

The presumption above referred to can ordinarily have no application to gifts. In the case of Putravakasam gifts some such presumption is applied in Travancore (*Kozhi Thoma* v. *Narayanan Krishnan* [1]) but the British courts have not yet done so. Gifts to wife and children though children are not in existence at the time are no doubt held to be branch property but this is really not an exception. This aspect of the case we have already discussed while considering branch property. The presumption cannot have application to transactions in which family funds are not used or at least family interests are not involved. The Karnavan taking, for instance, a land from strangers on Verumpattam lease could hardly be presumed to be acting for the family but the lease of a land on which the family has been living or of land though alienated in which the family still retains some interest and hopes some day to redeem might stand on a different footing. Acquisition of property would not be one of the duties of the Karnavan except as a method of investing family funds or unless personal needs of the family require it, the more so where the acquisition is one of onerous or speculative kind. In the case of grants from Government on Darkhast by reason of contiguity to family land or cultivation at family expense courts would readily infer, of course, acquisition in a representative capacity. It is only when the acquisition does not involve any detriment to the family, not necessarily to family property—detriment to family goodwill will suffice—that the court will infer a grant to the Karnavan individually. As held in *Subbayya* v. *Chellamma* [2] even where the acquisition is gratuitous, if the property is subsequently improved the burden would be on the manager to show that the improvement was not at the family expense and the property had not thereby become family property. It is doubtful if ordinarily these considerations will apply to acquisitions on Dharkhast by junior members not in possession of family property and without the connivance of the manager.

1. 22 T. L. R. 239. 2. (1886) I. L. R. 9 M. 477.

As under the Hindu law, once the prevalent theory under the Malabar law also was that the kàrnavan could not alienate immoveable property acquired by himself. (See S. A. No. 27 of 1859.) The same rule was applied later on to acquisitions of all members. S. A. No. 88 of 1859; S. A. No. 85 of 1860. But in 1863, Phillips and Holloway, JJ. held that "self-acquisitions are his separate property and may be charged by him for his personal debts" Moore's Malabar Law, page 175. But at the same time they retained so much of the old theory, viz., that after his death, they lapse into the Tarward property. In *Kallati Kunja Menon* v. *Palat Erracha Menon* [1], the same proposition was reaffirmed by Scotland, C. J. and Holloway, J. There they say "it is unquestionably Malabar law that all the acquisitions of any member of a family undisposed of at his death, form part of the family property, that they do not go to the nephews of the acquirer but fall as other property does to the management of the eldest surviving male. It is however as unquestionably law that the acquirer is fully entitled to hold, encumber and fully dispose in his life-time of his self-acquisitions." This doctrine of lapse, Mr. Justice Holloway had already applied to ordinary Hindu co-parcenaries in *Varadiperumal Udayan* v. *Ardanari Udayan* [2], but was overruled by the Privy Council in the Sivaganga case. His dictum in *Kallati Kunju Menon* v. *Palat Erracha Menon* [1], as to lapse was however followed by Innes and Muthuswami Iyer JJ. in S. A. 534 of 1878 where it was ruled that the acquirer could not dispose of his self-acquisition by will. Nevertheless they held that the Tarward was liable for the debts of the acquirer. In *Ryrappan Nambiar* v. *Kelu Kurup* [3], the bearing of the *Sivaganga case* [4] was noticed by Innes and Muthuswami Iyer, JJ. but their Lordships still refer to the property as lapsing to the Tarwad. However they draw the right inference therefrom, viz., that the property is taken by the Tarward as heirs of the acquirer. In *Alami* v *Komu* [5] the will of the last surviving member of a Tarward was upheld. Mr. Justice Muthuswami Iyer relies for that conclusion upon the Sivaganga case and his own decision in *Ryrappan Nambiar* v. *Kelu Kurup* [3]. In *Kattyassan* v. *Mayan* [6], the point again arose but was

1. (1864) 2 M. H. C. 162.
2. (1868) 1 M. H. C. 412.
3. (1881) I. L. R. 4 M. 150.
4. 9 M. I. A. 543.
5. (1888) I. L. R. 12 M. 126.
6. (1891) I.L.R. 14 M. 495.

left open. In *Achutan Nair* v. *Cheriotti Nayar* [1], the point was again directly raised and it was decided that self-acquired property could be disposed of by will. That result was arrived at by the application of the following principles (1) that the acquirer could dispose of the property, (2) that the Tarwad had no joint interest therein, (3) that whatever a person could validly dispose of by gift *inter vivos* he could dispose of by will. The rule laid down in this case was adopted by the legislature in Act V of 1898.

The other species of individual property usually met with are (*a*) property allotted at partition (*b*) tarward property in the hands of the last surviving member, (*c*) inherited property. When property is inherited by undivided groups, they will of course take as groups with the incidents of Tarwad property but where the individuals composing them are divided inter se or where there is only one individual entitled to inherit inheritance becomes a source of acquisition for individuals. So far as power of disposition *inter vivos* or testamentary is concerned these distinctions do not matter. In one view, they signify as to intestate succession. One other mode of acquisition which needs consideration is prescription. Ordinarily of course this mode of acquisition stands on the same footing as gift but if the title set up is family title, or the circumstances are such as to raise the inference of prescription for the family, the benefit of the prescription accrues to the family. For instance where the family is the lessee, and the Karnavan encroaches on adjoining waste land the very presumption of law that makes it a part of the holding would make it also a part of the family property. These questions are by no means peculiar to Malabar Tarwards, and the same solutions would answer for both the Malabar and the ordinary Hindu systems.

TESTAMENTARY SUCCESSION.

When dealing with the power of testamentary disposition over self-acquired property we have in a way touched on the question of testamentary succession. In *Alami* v. *Komu* [2], the learned Judges go fully into the matter and show that wills were common from very early times in Malabar. There is an allusion to the practice in Major Walker's Report in 1802 and a similar allusion also in the fifth Report. The wills produced in the case dated from 1826. There does not

1. (1897) I.L.R. 22 M. 9. 2. (1888) I. L. R. 12 M. 126.

seem to have been any doubt at any time as to the power of wiling away property in the absence of heirs. In 1837 a will bequeathing self-acquisition to nearer heirs to the exclusion of remoter ones was upheld. In 1843 the Sudder Court thought apparently that all property could be willed away if no title thereto in the claimant during the acquirer's lifetime, was made out. As to self-acquisition, there was a veering of opinion subsequently but ultimately power of disposition was admitted. The last surviving member's right was established in *Alami* v. *Komu* [1] The case of such property could hardly be distinguished in principle from that of property allotted at partition. But all this discussion is rendered unnecessary by the enacting of Act V. of 1893. It is a declaratory Act. It applies to persons domiciled in Madras and who are governed by the Marumakkathayam and Aliyasanthana laws of inheritance. (Sec. 3) Every person of sound mind and not a minor (*i.e.*, aged 18 years, Sec. 2) may by will dispose of the property which he could legally alienate by gift *inter vivos* and is deemed to have been always competent to dispose of such property. Sec. 5 invalidates wills obtained by fraud, collusion or such importunity as takes away free agency. S. 6 provides for revocation. Sec. 8 et seq., provide rules for execution, attestation, revocation, alteration and revival of wills. S. 7 provides that nothing contained in S. 4 shall (a) affect any right established before the commencement of the Act by any court of competent jurisdiction (b) or authorise a testator to deprive any persons of the right of maintenance or (c) affect any law of the intestate succession or authorise any testator to create in the property any interest which he could not have created before the Act. The exact significance of the last clause is not clear. Possibly it was thereby intended to prevent the application of ordinary rules of succession to cases to which the rule of survivorship or lapse had been previously applied. The right of maintenance referred to is apparently the right conferred by S. 17 of the Malabar Marriage Act.

(*To be continued.*)

1. (1888) I. L. R. 12 M. 126.

SUMMARY OF ENGLISH CASES.

Gill *v.* Carson and Nield: (1917) 2 K. B. 674.

Highway—Obstruction—What constitutes—Offence— Town Police Clauses Act, 1847 (10 and 11 Vic. C. 89) S. 28.

To constitute the offence of wilfully causing an obstruction in a public thoroughfare within the meaning of S. 28 of the Town Police Clauses Act there must be an unreasonable user of the highway. For a person merely to stand still, or to cause his horse and cart to stand still in the roadway is not causing an obstruction. It is, however, not necessary that any person should be actually obstructed; it is sufficient if there is proof that in the ordinary course persons may be obstructed, and that the actual use of the road was calculated to obstruct.

Anglo Russian Merchant Traders and John Batt and Co., *In re*: (1917) 2 K. B. 679.

Damages—Contract for shipment of goods—Prohibition against export without a licence—Implied term of the contract —Failure of vendor to obtain licence—Shipment from foreign country—Defence of the Realm (Consolidation Regulations) 1914, Reg. 30 A.—Effect of—Vendor not liable in damages.

By a contract made on 19-8-1915, defendants sold to plaintiffs, both parties being resident in England, 50 tons of aluminium, "to be shipped by steamers to Vladivostock during December-January next. Price, 180 £. per ton, cost and freight to Vladivostock......Payment, cash against documents by London Bank." At the date of the contract there was to the knowledge and in the contemplation of the sellers and buyers a prohibition of export of aluminium from England except on licence granted by the Crown.. On and after 7-12-1915, it was made illegal by an order under Regn. 30 A. of the defence of the Realm (Consolidation) Regulations, 1914, for any person in England to buy sell or deal in aluminium, whether or not such sale, purchase, or dealing was to be effected in the United Kingdom, without a permit from the Crown. The sellers duly applied for a licence to export aluminium from England but a license was refused. The failure of the defendants to ship was due to their inability to obtain a licence. It was also found that the defendants did not, after 7-12-1915, apply for a permit to purchase aluminium in America so as to ship it from there and even if they had

so applied, the Government of England would not have granted a permit. In an action for damages for breach of contract :—

Held that the contract did not impose upon the sellers an absolute obligation to ship or to pay damages on default of shipment; that though the shipment was not limited by the contract to a shipment from the United Kingdom, Regn. 30 A. of the Defence of the Realm Regulations prohibited export of aluminium from any foreign country by a British subject; that the sellers had used reasonable diligence to obtain a licence to ship but failed and that consequently before there was any default on the part of the sellers, the further performance of the contract became illegal and the defendants were not liable in damages.

New Zealand Shipping, Co., and Societies Des Ateliers et Chantiers De France, *Inre*: (1917) 2 K. B. 717 C. A.

Contract—Construction—Contract to be "void" on a certain contingency—Effect of—Party cannot take advantage of his own wrong—Scope of the rule.

When a contract contains a provision that it is to become 'void' in a certain event, it becomes void and not voidable on the happening of that event. But a party who is alleging that the contract is void cannot rely on his own default or wrong in order to bring into operation the clause making the contract void.

Huntley (Marquis), *In re*: **Goldstein,** *Exparte* (1917) 2 K. B. 729.

Bankruptcy—Courts to act in aid of each other—Scope of the rule—Transfer of ordinary business by County Court to High Court—Bankruptcy Act, 1914, S. 122.

S. 122 of the Bankruptcy Act which provides for Bankruptcy courts assisting each other in the work of bankruptcy, was passed to enable one court to assist another in dealing with matters within the jurisdiction of the court asked to act, but not so as to authorise a matter proper to be dealt with by the requesting court to be sent for trial by another court.

Harrisons and Crossfield *v.* **London and N. W. Railway** (1917) 2 K. B. 755.

Carrier—Liability of—Negligence—Theft by servant—Prosecution by carrier—Effect of—Estoppel.

The plaintiffs, a firm of tea-merchants sent a consignmen

note to their wharfingers requiring them to deliver three chests of tea to the defendants, a railway company, for the purpose of carriage and delivery to certain purchasers.

A cartman who had been in the service of the railway company, but who at the time was on sick-leave, appeared in uniform with a horse and cart of the railway company, demanded and received the tea but converted it to his own use. The railway company successfully prosecuted the cartman for larceny. In an action by the plaintiff's against the defendants for breach of duty as common carriers:

Held, that in the absence of proof of negligence, the defendants were not liable, inasmuch as they had not ratified the possession of the cartman under a contract of carriage, though by prosecuting him they might have recognised his *de facto* possession of the tea.

H. O. Brandt and Co. *v.* **H. N. Morris and Co., Ltd.** : (1917) 2 K. B. 784.

Contract—Construction — Principal and agent—Contract signed by person without qualification—Right to sue on contract —Contract for delivery of goods by instalments—Breach— Assessment of damages.

When a man signs a contract in his own name he is *prima-facie* a contracting party and liable, and there must be something very strong on the face of the instrument to show that the liability does not attach to him.

In a suit for damages for breach of a contract to deliver goods by instalments the time for assessing the damages would ordinarily be the date fixed for each delivery.

In re **A debtor.** (1917) 2 K. B. 808.

Bankruptcy—Incorporated company—Resolution giving general authority to officer to present petition—Act of bankruptcy after resolution—Bankruptcy Act, 1914 S. 149.

It is competent to an incorporated company to give a general authority to one of its officers to present petitions in bankruptcy in respect of acts which might be committed in future, after the authority was given.

C. Sharpe & Co. *v.* Nosawa & Co. (1917) 2 K. B. 814.

Damages—Contract for sale of goods—C. I. F. Contract—Breach—Time for measuring damages—Arrival of goods or of shipping documents—Sale of goods Act. 1893, *S.* 51 *Sub. S.* 3.

A C. I. F. contract for sale of goods is performed by the vendor taking reasonable steps to deliver as soon as possible after shipment, the shipping documents including the bill of lading and policy of insurance, and the buyer paying the price against the documents unless there is some other stipulation as to payment in the contract. But performance by the seller is by delivery of the documents which represent the goods (*i.e.*) the bill of lading, which is a constructive delivery. In a suit for damages for breach of such a contract, the damages have to be measured by the difference between the contract price and the market price on the date when the shipping documents would, if sent forward with reasonable despatch, have reached the buyer and not on the date when the goods ought to have been physically delivered to the buyer.

Armstrong *v.* Jackson: (1917) 2 K. B. 822.

Contract—Rescission—Executed contract—Fraud-Decrease in value—Relief when granted—Fiduciary relation—Principal and agent—Broker, duty of.

Where a vendor has procured the sale of his property by misrepresentation the purchaser can set aside the contract of purchase, prior to completion, even though the misrepresentation be innocent. But if the contract has been executed by the completion of a conveyance or lease, or the formal assignment of a chattel, then rescission cannot be obtained on the ground of innocent misrepresentation by the vendor or lessor. When the contract is so completed, fraud must be proved before rescission can be granted.

A broker who is employed to buy shares cannot sell his own shares unless he makes a full and accurate disclosure of the fact to his principal, and the principal, with a full knowledge, gives his assent to the changed position of the broker. Where however the principal buys in ignorance of the fact, he is entitled to rescind the sale notwithstanding the fact that he took a formal transfer of the shares and became the registered holder thereof

or that the value of the shares had diminished considerably between the date of the sale and the date of the action for rescission.

Mousell Brothers *v.* London and N. W. Ry., Co. (1917) 2 K. B. 836.

Criminal Law—Vicarious liability—Mens rea—Necessity of—Rule—Exception.

By the general principles of the Criminal Law, if a matter is made a criminal offence, it is essential that there should be something in the nature of *mens rea,* and therefore, in ordinary cases a corporation cannot be guilty of a criminal offence, nor can a master be criminally liable for an offence committed by his servant. But it may be the intention of the Legislature in order to guard against the happening of the forbidden thing, to impose a liability or even a personal penalty upon a principal even though he does not know of, and is not a party to, the forbidden act done by his servant. Many statutes are passed with this object. Examples of such statutes given in the judgment of Viscount Reading, C. J.

Morrison *v.* Lord Mayor, etc., of Sheffield: (1917) 2 K. B 866.

Tort—Local authority—Trees planted in highway and protected by spiked guards—Injury to lawful traveller—Lighting prohibited under Defence of Realm Regulations—Public Health Act, 1890 *S.* 43.

The defendants, an urban authority, acting under the provisions of S. 43 of the Public Health Acts planted trees in a highway and surrounded each tree with an iron spiked guard. Sometime after, all street lights were ordered to be extinguished in pursuance of an order under the Defence of the Realm Regulations. The plaintiff who was travelling along the road at night came into contact with a spike and sustained serious injuries. In an action by the plaintiffs for damages, *held,* that the defendants were negligent in having omitted to take reasonable precautions to prevent the guard from being a danger to the public lawfully using the road and that they were liable in damages.

Hayward v. Drury Lane Theatre, Ltd. (1917) 2 K. B. 899.

Master and servant—Injury to servant in course of employment—Volunteer with interest—Liability of master for negligence of servant.

The defendants were a theatrical company who were preparing for the production of a revue. The plaintiff a dancer, was present at the rehearsals of the revue though she was under no contract with the defendants to attend them and was not paid for her attendances, but merely attended in the hope and expectation of obtaining an employment for the run of the revue when it was ready for production. At one of such rehearsals a stair-case was fixed upon the stage by the direction of the producer of the revue by a servant of the defendants, who however fixed it in such a way as to be unsafe. The plaintiff took up a position on the stair case by the direction of the producer, when the staircase collapsed and the plaintiff sustained severe injuries. In a suit to recover damages, *held* that the plaintiff was not a servant of the defendants nor a mere volunteer who could not be in a better position to recover damages from the defendants than their own servants, but was a volunteer in a service in which she had a common interest with the defendants. The doctrine of common employment had no application to the case and the plaintiff was entitled to recover damages.

Brodie v. Brodie (1917) P. 271.

Restitution of conjugal rights—Action for—Defence to—Agreement to live separate entered into before marriage and confirmed thereafter—Public policy—Void.

In answer to an application for restitution of conjugal rights the husband pleaded an agreement entered into before the marriage ceremony and confirmed by an indorsed agreement signed thereafter, under which it was provided that the parties might live apart if they pleased.

Held, that the two documents formed one agreement which was void as being opposed to public policy and that the agreement afforded no defence to the wife's petition. The first agreement being illegal at its inception and therefore void, could not be confirmed by the second.

Talbot v. Jevers (1917) 2 Ch. 363.

Crown—Forfeiture—Conviction for felony—Vested interest in personal estate directed to be applied in purchase of land.

The equitable doctrine of national conversion of land into money or money into land has no application to the rights of the crown in cases of forfeiture, escheat or bona vacantia. The vested interest of a person convicted of felony before 33 and 34 Vict. C. 23 in personal estate directed to be applied in the purchase of land is forfeited to the crown.

JOTTINGS AND CUTTINGS.

The Engagement Ring. On another page a recent English decision of Shearman, J., is noted to the effect that when an engagement ring is given by a man to a woman, there is an implied condition that the ring shall be returned if the engagement is broken off. The learned Judge in the course of his jndgment says:—

"The history of the engagement ring is interesting. We read in the Book of Genesis that Abraham presented earrings when Rebecca was betrothed to Isaac; and, no doubt, the story represents the ring in those days as a sign or symbol of an agreement to carry out a bargain and sale of the woman. When one comes to the time of civilised law, the woman ceases to be a chattel, and one finds in Justinian the ring used as an *arrhabo*, or a pledge for the contract of marriage or *sponsalia*. This found its way even into early English law. Times, however, are changed now; but, though the origin of the engagement ring has been forgotten, it still retains its character of a pledge or something to bind the bargain or contract to marry, and it is given on the understanding that a party who breaks the contract must return it."

We may supplement what Shearman, J., says by adding that espousal among the Anglo-Saxons was concluded by the delivery of a ring, which the Anglo-Saxons Dooms called in the Vernacular a "wed". The exchange of rings was the "wedding". The parties might afterwards be affianced to each other in the presence of the Church. Now-a-days, as Professor Jenks points out in his *Law and Politics* in Middle Ages, we reverse the order of things. The ring is given at what we understand by the "wedding." But the engagemeut ring survives to mark the ancient rule. Any contract in Anglo-Saxon times was a "wedding;" any breach of

contract was "wed-bryce". "And first we teach," say the Dooms of Alfred, " that every man hold to his oath and his wed," that is, to his pledge :—*The Canadian Law Times for October 1917.*

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Chops and Tomato Sauce :—In the summer of 1836 a *crim. con.* action was brought by one Norton, the husband of one of the most beautiful of the Sheridan sisters, against Lord Melbourne who was then Prime Minister. Sir William Follett, who was of counsel for the plaintiff, offered certain letters in evidence against Lord Melbourne. One was in the following terms : " How are you ? I shall not be able to call to-day, but probably shall to-morrow. Yours, &c., Melbourne." And another ran : " There is no house to-day; I will call after the levee, about four or half past. If you wish it later let me hear from you. I will then explain to you about going to Vauxhall, Yours, &c., Melbourne."

Sir William described these letters as " the most important the most tell-tale, the most damnatory". That they failed of their effect is proved by the fact that Lord Melbourne was triumphantly acquitted by the jury. It is now generally believed that Charles Dickens who, at that very time, was writing the Pickwick Papers modelled himself upon these letters when he made Mr. Pickwick write to Mrs. Bardwell : "Garraway's twelve o'clock. Dear Mrs. B, chops and tomato sauce, Yours Pickwick ", and again, "Dear Mrs. B., I shall not be at home till to-morrow, Slow coach. Don't trouble yourself about the warming pan." Who, even writing fiction, would have dared to make his imaginary counsel put forward such evidence? But Dickens was merely ridiculing what Follett had done in solemn earnest! It will be remembered that the Pickwick Papers were dedicated to Mr. Serjeant Talfourd. He was counsel for the defendant in the Norton case. It was the Serjeant who indirectly contributed the germ of the joke which so greatly entertained the friends of Mr. Peter Magnus. Serjeants junior to Thomas Noon Talfourd, whose name was last on a particular list of the members of the order, were known in the Common Pleas as " Afternoons ":—*Canada Law Journal, Aug.—Sep.* 1917.

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Judicial Salaries :—Sir Edward Coke (Chief Justice of the King's Bench in 1613) had £224-19-6 a year, the contemporary Chief Justice of the Common Pleas £161-13-4, and the judges

£154-19-8 together with a circuit allowance of £33-6-8. At the same time the salary of the Chief Baron of the Exchequer was £154-19-8; the Baron's annual £133-6-8 being supplemented by 'fees.' The following century saw the judges increasing apace in affluence. In the reign of George I the salaries of the 'chiefs' went up from £1,000 to 2,000 and those of the judges from £1,000 to 1,500. By this time, however, it had been customary for the judges to receive certain perquisites, presents and fees, which agreeably supplemented the official pay. Sugar loaves from the Warden of the Fleet and the prothonotaries, dedimus money from the cursitors, fees from the clerk of the warrants and from the enrolment office were all to be expected. By the 19 Geo. 3, c. 35, a yearly £500 was added to the Chief Baron's pay, and £400 to the puisne judges' and Barons'; and twenty years afterwards the 39 Geo. 3, c. 110. refixed the salaries as follows: Master of the Rolls, £4,000; Chief Baron £4000.; and puisne judges and Barons, £3,000. The same statute gave these pensions: the Lord Chancellor, £4,000; the Chief Justice of the King's Bench, £3,000; the Master of the Rolls, the Chief Justice of the Common Pleas, and the Chief Baron of the Exchequer, £2,500 each; and the Judges and Barons, £2,000.

A statute of 1809, (an Act for further augmenting the salaries of certain of the Judges of the Courts in Westminster) increased the Chief Baron's pay to £ 5,000, and that of the Judges and Barons to £ 4,000.—the 'second judge' receiving a further £ 40 for charging the Grand Jury each term aud pronouncing judgments on malefactors. The reign of George IV saw the Judges placed on a pinnacle from which they quickly descended. By the passing of 6 Geo. IV, cc. 82, 83 and 84, the Chief Justice of the King's Bench, the Chief Justice of the Common Pleas, and the Master of the Rolls found themselvss with salaries of £ 10,000, £ 8,000 and £ 7,000 respectively. The Chief Baron by the same Act was advanced to £ 7,000, the Vice-Chancellor of England had £ 6,000; and the Judges and Barons of the Exchequer £ 5,500. Pensions were fixed as follows—£ 4,000 for the Chief Justice of King's Bench; £ 3,750 for the other two 'Chiefs', the Master of the Rolls and the Vice-Chancellor of England; and £ 3,500 for the Judges and Barons.

Had it not been for the opposition of Brougham, the Judges and Barons might have fared even better, for £ 6,000 was the

annual salary proposed when the Act was in its early stages. From a pension of £ 2,800 which the framers of the measure had considered adequate, they were saved by the exertions of Scarlett. Various odd facts and arguments were contributed by legal debaters during the passing of the Bill. The reason for the increase of the Judge's salaries in 1809—the inflated prices of commodities—had ceased to operate; Justice Buller, who had become a Judge at the age of thirty-two, had accumulated a large fortune on the Bench; and Mr. Baron Wood, notwithstanding the loss of the sight of one eye and hearing of both ears, had clung to the Bench rather than retire into pensioned poverty.

The golden age was only of a few months' duration. An arrangement was come to in November, 1828, that newly appointed Judges should agree to accept £ 5,000 instead of the statutory £ 5,500; and the reduced amounts became the regular judicial salary by the 2& 3 Will. IV. c. 116. The same Act took £ 2,000 from the Chief Justice of the King's Bench, £ 1,000 from the Chief Justice of the Common Pleas, and the additional £ 40 a year from the 'second judge.' Untouched by this statute, the Master of the Rolls retained his £ 7,000 a year till 1851, when he was reduced to £ 6000.

The Salaries so settled in the reign of William IV have survived unaltered. Meanwhile, the Country Court has come into existence, and it has been ascertained that the offer of £ 1,500 a year will tempt practising barristers of position to accept judicial rank. Also it is common knowledge that the number of 'silks' who, under present conditions, make an income at the Bar of £ 5,000 a year is so insignificant as to be almost negligible. These are considerations which may, if some reformers have their way, induce Parliament, when the subject next comes to be discussed, to revive the existing scale:—*The Law Journal, October, 1917.*

CONTEMPORARY LEGAL LITERATURE.

In the "*Law Quarterly Review*" for October, 1917, Mr. Harold Hazeltine gives an account of the Law Schools and Legal Practitioners in the United States of America. American history falls into three periods. The colonial period, *i.e.*, from 1606 to about 1760, the Revolutionary period (1760-83) and the National period (1783—to the present day). During the first period

although the Royal charters declared that colonial laws should conform as nearly as possible to the law of England each colony developed its own body of law suited to its own peculiar needs. The Law as enacted and enforced by them was popular Colonial law as distinct from the complex and technical system of lawyer-made law in contemporary England. The factors that contributed to such a state of affairs were the following. The primitive conditions of life obtaining gave rise to a tendency to revert to archaic principles or to introduce novel legal solutions. So too dissatisfaction with English institutions led to some divergence. In some of the New England colonies puritan influence told. Wide discretionary powers were exercised by judicial tribunals. This led to considerable departure in legal practice. In addition to all these, there was an utter absence of trained lawyers who made their appearance only in the latter part of the 17th and the beginning of the 18th century. As complex economic situations arose need was felt for a trained Bar, and with them came the English law and English procedure. The gradual transformation of chartered colonies into Royal provinces also had an important influence in bringing them in. Though each state law had its own peculiar feature all of them developed more or less after the English model and generally agreed. By the time of the revolution, lawyers had largely displaced laymen on the Bench and the bar had so far advanced in learning and influence that Burke referred to them in terms of great eulogy. English trained barristers founded Law Schools which formed centres of legal learning and many young men travelled to England to study law. The procedure adopted by aspirants to the legal profession was either to qualify for the English Bar or to read law in the offices of Court clerks or of Colonial practitioners. Towards the close of the revolutionary period the Americans paid greater attention to systematic instruction in their own country and established several professorships in law. The dual system of Government led to a dual system of law. On the one hand there is the federal law, and on the other there are the numerous systems obtaining in the several states forming the Union. Although there is no federal common law, the federal courts in the exercise of their constitutional powers, frequently interpret and enforce State Common Law. The dual system has also led to a dual Bar—the Federal Bar and the numerous State Bars but all these bars have certain common characteristics inherited

from the English Bar. There are several Law Schools which deal with State Law, but the best schools teach the main principles of the Federal Law and the common principles of the State law and equity with due attention however to the peculiar features of each State law. This affords a particularly valuable training in methods of comparative law. There were once 4 grades of practitioners in America, Attorneys, Counsellors, Barristers and Serjeants. During the early 19th century, these distinctions were abandoned, except in New Jersey where even to-day only "Counsellors" have the right to appear in the highest Courts of the State. The existence of the various grades and certain other features, it is said, gave certain aristocratic air to the profession which has now declined and with it, the profession also seems to have declined and concurrently there has been laxity in the State Bar Examinations and enormous increase in the number of lawyers. As a result, the standards of State Bar Examinations and more effective disciplinary control have become two of the most pressing and important of all problems that now confront the profession there. The present requirements for admission to State Bars vary considerably. In Indiana, every voter of good moral character is entitled as of right to practice; at the other end stands New York where he must have studied law for four years before he is allowed to appear for the State Bar Examination. The State of Massachussets has recently reduced by statute school attendance for admission to the Bar to two years of study in an evening school. In general, the present standards for admission to the bar in respect of general education, legal study and character of Bar Examination papers are far too low. In 1910 there were 1,14,000 lawyers in the United States of America. In spite of all this the American Bar as a whole stands high in character learning and ability. The first Law School to be established was the Lichfield Law School in 1784. Harvard Law School was established in 1815-17. It became a leading school during the time of Story. The peculiarity of the American Law Schools is the case method of legal study. Since the civil war, there has been a phenomenal increase in the numbers and size of law schools. These schools are of 3 kinds—Correspondence, Night, and College and University Schools. Owing to the present low standards the first two kinds of schools flourish. In the Law Schools, there is every attempt

made to improve the level of culture and training. One of the important factors in the development in these schools is the influence of the Association of American Law Schools. The requirements for admission to law schools vary; good many requiring one or more years of collegiate pre-legal study, some two or three requiring the students to be graduates of colleges of high grade. The foremost schools require three years' residential legal study for the first law degree, and a fourth year's study for the advanced degree.

Sir Malcolm M'Ilwrath gives a summary of the arguments of contesting parties in France at the time of the passing of the provision of Divorce Law which provides that "when separation has lasted for three years, the judgment shall be converted into a judgment of divorce as of right, on the application of either spouses." There is a similar proposal in England which is influentially supported.

Mr. Charles Sweet continues his examination of restraints on alienation. He claims to have established that under the law, a restraint on alienation may be imposed if its object is lawful and reasonable. This doctrine explains the validity of options to purchase and rights of prescription. He shows that the decision of Jessel, M. R. in *In re Macleny* [1] that a restraint on alienation qualified in point of time or as to persons or as to the manner of alienation is good is opposed to authorities. He also shows that the rule against perpetuities which is really a rule against remoteness and applicable to future interests is by confusion, taken to be applicable to present interests, for instance trust for the maintenance of a tomb is said to be bad as opposed to the rule against perpetuities.

Professor Oppenheim discusses the legal relations between an occupying power and the inhabitants. The recognition of the *de facto* occupation in international law goes only to this extent, *viz.* that it makes the legitimate acts of the occupying power in the administration of the occupied territory binding on the lawful Government. But this does not involve the further duty on the part of the inhabitants to obey the occupier. He is no doubt bound to obey the laws of his own country in so doing he does not obey the occupant. Even the German Government seems to recognise this principle for justice is still administered by the Belgian courts in the name of the

1. L. R. 20 Eq. 185.

Belgian King. The Professor points out that the inhabitants are not bound morally or legally to support the occupant or not to betray his secrets though of course, if any inhabitant acts against the occupier though in accordance with the dictates of patriotism, the occupier may be within his rights to impose punishment for such act but the objection to the execution of Nurse Cavell is the inhumanity and the disproportionate nature of the punishment and not the want of authority to impose punishment.

In *the American Law Review*, Hon'ble George B. Rose points out the probability of attacks on the Constitution and the Judiciary by socialism and anarchism as a result of the war. He advises a study of the problems.

REVIEWS.

MUHAMMADAN LAW OF MARRIAGE AND DIVORCE, *by Ahmed Sukri, LL. B., Ph. D. Columbia University Press : New York.*

We are glad to acknowledge the receipt of the above book printed at the Columbia University Press and which forms the 7th of a series of contributions to oriental History and Philology. In this small volume of 126 pages the author has placed before the public, an admirable treatment of the subject from a purely scientific point of view of jurisprudence and demonstrated the high state of perfection which the Mahomedan Law had attained in the early centuries of the Christian era and which can compare very favourably with the Jurisprudence of any civilised country of the present day. In the opening chapter, the author gives a very interesting account of the sources of Mahomedan Law and its development under the great Mahomedan Jurists of the various Schools, next he deals with the legal view of marriage from the point of view of Mahomedan Jurists and compares it with that of other systems of law. In the course of this discussion, the author repudiates the view that is sometimes held that the Prophet either adopted or legalised polygamy in his system. After referring to the state of society in the various countries at the time, the author concludes by saying that the Prophet did not "insist that his followers should take many wives. As a statesman he recognised polygamy as an ethnic condition and he acted wisely in not interfering with it. Any innovation in this direction would have upset the entire fabric of Eastern Society and might have been fatal to Islam "; and in passing he also notices the qualification implied in the saying "But if you

cannot deal equitably and justly with all, you shall marry only one." The author then deals with the impediments to marriage by reason of consanguinity, affinity, occupation, &c. Next he refers to the formation of the marriage contract by the necessary proposal and consent. In the next chapter the author deals with "Dower," its nature, amount and time of payment. Dealing with the nature of Dower in Mahomedan Law, after referring to its analogies in other systems, the author says, "Whatever may have been its origin among the Arabs, Mahomedan jurisprudence refuses to recognise dower as price or even as consideration. Dower is a result of marriage imposed by law 'merely as a token of respect for its object, the woman'." The next part deals with the matrimonial relation and under it, the duties of the husband and the wife, &c.

In the last part, the author deals with the subject of Divorce. Hereafter referring to the other forms of repudiation by the husband, he says that the *Bid'i* form of divorce which is effected by three repudiations at anytime and without definite intervals is not approved and is regarded as heretical. It is said that it was not recognised by the Prophet and that it was strongly disapproved of by him.

We would heartily recommend this little volume for the use not only to students of law but also to general readers as giving an admirable exposition of the Mahommedan system of marriage and divorce.

LAW AS A CAREER *by S. Ambaravaneshwar, M. A., B, L., Pleader, Trichinopoly.*

This small pamphlet is the substance of an address delivered at the first anniversary of the Tiruvadi Bar Association with the Hon'ble the Advocate General in the chair.

The address deals in its short compass, with the scope and the usefulness of the lawyer and answers some of the criticisms which have been commonly directed against the lawyers and their influence on society at large. In the course of the address reference is made to the various qualities and attainments so difficult to combine in one individual which makes for success in the profession. We would recommed this pamphlet for the perusal of those who have the interest of the profession at heart.

The Madras Law Journal.

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SOME QUESTIONS UNDER S. 20 OF THE LIMITATION ACT.

(Continued from 32 M. L. J. p., 11.)

Difficult questions sometimes arise under S. 20 where properties comprised in a mortgage pass into the hands of different persons and the mortgagee relies on payment by one of them to keep alive his claim against the rest. The simplest case (a) is that of a mortgagor who may assign away the equity of redemption in some of the mortgaged properties. Some complication may arise if (b) as between the mortgagor and his transferee there should be an express agreement that one of them alone should be responsible for the *whole* debt, and more still if (c) a third party, without acquiring any interest in the mortgaged properties, contracts with the mortgagor (for some other consideration) to pay up the whole or any portion of the mortgage debt. Again (d) some of the mortgaged properties may be assigned in parcels to more than one purchaser or (e) the mortgagor may retain none of the properties at all in his hands. The mortgaged properties may (f) get parcelled out between the heirs and devisees of the mortgagor or between different devisees; and lastly, in partitions or other family arrangements among joint family members or co-heirs, the mortgaged properties may be allotted to one or some (g) either on the understanding that he or they should pay the *whole* debt or (h) with a provision for payment of the debt by somebody else. What is the effect, in these several instances, of a part payment or payment of interest, by one or another of the parties concerned, in preventing the running of time as regards the rest?

Krishna Chandra v. *Bhairab Chandra*[1] and *Domilal Sahu* v. *Roshan Dobay*[2] furnish instances of the first type. The court there held that a payment by the mortgagor, after the assignment, would save limitation even as against the assignee; and in the earlier of these cases, the court went further and laid down that

1. (1905) I. L. R. 32 C. 1077.
2. (1906) I. L. R. 33 C. 1278.

an 'acknowledgment' by the mortgagor *after* he had sold away some of the mortgaged properties would suffice to save time as against the purchaser also. This last point seems to us open to question (cf. per Mookerjee, J. in *Surjiram* v. *Brahma Deo* [1] and *Velayuda* v. *Narasimha* [2]). But as regards the effect of 'payment' the position appears free from doubt (see also *Hem Chandra* v. *Purnachandra* [3]) and it is also supported by the principle of the decision of the House of Lords in *Chinnery* v. *Evans* [4]. There has been some discussion in England as to the exact basis and scope of this decision of the House of Lords and some difficulty has been caused by the Judgment of the Court of Appeal in *Newbould* v. *Smith* [5]. In *Domi Lal Sahu's case,* the learned Judges rest their conclusion on the language of the Limitation Act and get rid of *Newbould* v. *Smith* [5] by saying that they were only concerned with the language of the Indian Statute. In *Newbould* v. *Smith* [5] the court laid stress on the fact that at the time of the alleged payment of interest the mortgagor had completely parted with his interest in the whole property, this will be class (e) *supra*—and as a matter of fact even the remedy on the personal covenant seems to have become barred; but even so, the House of Lords, when the case went up on appeal, desired expressly to leave the point open. The case has not been generally accepted or followed even in England. *Chinnery* v. *Evans* [4] has been treated as a leading case and the ratio of the decision has been taken to be that, as the rule in respect of the effect of payment in saving limitation is based on the inference of an 'acknowledgment of liability', the payment to have that effect must have been made by a person 'liable to pay.' This is substantially the language of S. 20 of our Act; but the theory of inferential acknowledgment or implied promise (as it is sometimes put) ought not to be taken too literally, for on that footing, a payment by one person cannot be held to affect another except under circumstances warranting an inference of *agency*. This was just the difficulty in *Newbould* v. *Smith* [1]. Other English cases have escaped the difficulty by a rather literal application of the theory of 'implied' agency but that is not possible in India, in view of the terms of Ss. 19 & 20 of the Limitation Act.

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1. (1905) 1 C. L. J. 337.
2. (1916) 32 M. L. J. 263.
3. (1914) 22 I. C. 510.
4. (1864) 11 H. L. C. 115.
5. (1886) 33 Ch D. 127.

A further question is what must be the nature of the liability of the person who makes the payment, should it be of the same kind or origin as that of the original debtor or other person sought to be bound thereby? Thus a mortgagor may be 'personally' liable for the mortgage debt but not one who purchases the property from him. Can a payment by the purchaser be relied on to extend time in respect of the 'personal' liability of the mortgagor? Again, should there necessarily subsist any particular legal relation between the creditor and the person paying, so as to give the former a right of *direct recourse* against the latter? In other words, can a payment of interest or part payment by one person furnish a fresh starting point for an action in which the person paying *cannot himself be made liable*. To these questions, reported decisions in India do not sufficiently help us to give a decided answer.

Quite recently, in *Brajendrakishore Roy* v. *Hindustan Co-operative Insurance Co.* [1]—which by the way, was a case of principal and surety—it was indicated as necessary condition for the application of S. 20 to the class of cases now under discussion, that the debt or liability in question must be *single*, though different persons may be or have become liable in respect thereof in different ways and degrees or at different times. This may in most cases be predicated of the mortgage debt. But the point as to which there is room for doubt even here is as to the relation of the creditor to the particular liability in acknowledgment of which the payment must be deemed to be made. Suppose, as between the mortgagor and his assignee there is an 'express' agreement that the mortgagor and the properties in his hands should be solely responsible for the mortgage debt. No doubt this would not of itself affect the remedies of the mortgagee against the properties in the hands of the assignee. But when in pursuance of such an agreement the mortgagor makes a payment, it may well be argued that the mortgagor acts for himself and not as representing the mortgaged estate or its other owners and that therefore, the payment cannot save limitation as against the assignee if the true theory be that for this purpose the payment must be capable of being regarded as made 'for the other' or supporting an inference of an acknowledgment of liability by the other. As against this, there is the consideration stated in *Chinnery* v. *Evans* [2] that the mortgagee

1. (1917) I. L. R. 44 C. 978. 2. (1864) 11 H. L. C. 115.

naturally looks to the mortgagor for payment and when the latter goes on making payments, the mortgagee should not so far as his right to proceed against the security is concerned, be affected by any arrangement behind his back as between the parties interested in the equity of redemption. But the force of this last mentioned argument will be very little in cases where the mortgagee has knowledge of any special arrangements between the mortgagor and his assignee. The same observations would apply to the other alternative of payments by the mortgagor, in spite of an arrangement between the mortgagor and his assignee that the *latter* should bear the whole burden of the debt. Where however a payment is made by the assignee and that is relied on as furnishing a fresh starting point even as against the mortgagor, it can be argued with some force that the assignee is not the person primarily liable, that if, on the score of payments by him, the mortgagee chooses to leave the mortgagor alone till the period of limitation expires as against the latter, there are no special considerations, founded on what may be described as the ordinary way of the world in favour of the view that the claim against the mortgagor must nevertheless be regarded as kept alive.

The question presents even greater difficulty if the payment is made by a person who, whether personally or by means of some property in his possession, is *not directly liable to the creditor* for the debt to which the suit relates. A familiar case of this kind is that in which a debtor selling his properties (unconnected with the mortgage) directs the vendee to pay a portion of the sale price to the mortgagee. Will there be any difference between cases in which the vendee is directed to pay the *whole* debt and those in which the direction relates only to a part of the debt? Is it any material circumstance whether with reference to the facts of each particular case, the court is or is not able to hold that the creditor has a direct right of action against the vendee. In *Alagappa* v. *Subramaniya*[1], Wallis and Sadasiva Iyer, JJ. assumed that the question of limitation must be decided on the footing of an 'agency' as between the debtor and his vendee because that is the legal effect of the direction to pay. But in a very recent case, where the facts were similar, the Calcutta High Court has held that the creditor may maintain a suit against the

1. (1914) 26 M. L. J. 509.

purchaser (see *Dwarikanath Ash* v. *Priyanath Malki* [1]) and this will certainly be so in cases where the purchaser enters into direct relations with the creditor or, in the words of Bowstead, 'expressly or impliedly contracts' with the creditor to pay him or hold the money on his behalf (cf. *Sivasubramanya* v. *Gnana Sambanda* [2] which is not affected on this point by the Full Bench decision in *Siva Subramanya* v. *Subramanya* [3]). It does not necessarily follow that in such cases there will be a cessation of the original liability, by way of *novation*, and of course there can be none such when the direction to the vendee relates only to a part of the debt. If, as often happens, the vendee in such cases pays the amount, at his own convenience or in instalments, can the theory of agency or any other principle be applied even in those circumstances, so as to save limitation against the original debtor, by force of such payments. Except where the inference of an 'agency' is possible, the test, as stated in some of the English cases is, is such payment a payment of the original debt by a person *bound* to pay *that* debt (Cf. *Harlock* v. *Ashberry* [4]). In *Roddam* v. *Morley* [5], the expression 'party liable' was held to include any person against whom an action for the debt could be brought; and in *Lewin* v. *Wilson* [6] the Privy Council pointed out that money brought in by a stranger to the mortgage contract would not have the legal quality of *payment*; it would be a gift from a person not entitled to tender it to a person not entitled to demand it. Even where the person paying is under a liability to pay and the creditor is entitled to demand payment, the Indian cases relating to principal and surety require the further condition that the debt or liability of such person should be the *same* as that of the person against whom it is relied on to save limitation.

In *Saradacharan* v. *Durgaram* [7] the eldest of several brothers, who was also the managing member, made a payment of interest in respect of a mortgage debt incurred by their deceased father. When subsequently the creditor sued to enforce the mortgage as against all the brothers, the Court held that a fresh starting point was afforded by the payment of interest above referred to as, in making it, the eldest brother 'must be regarded as an agent'

1. (1917) 22 C. W. N 279.
2. (1911) 21 M. L. J 359.
3. (1916) I. L. R. 39 M. 997.
4. (1882) L. R 19 Ch. D. 539.
5. (1858) 1 De. G. & J. 1.
6. (1886) L. R. 11 A. C. 639.
7. (1910) I. L. R. 37 C. 461.

of the rest 'by operation of law.' But after referring to *Krishna Chandra* v. *Bhairab Chandra* [1] and *Domi Lal Sahu* v. *Roshan Dobay* [2] the learned Judges also added that they were disposed to accept the argument that the mortgage debt being binding on all the members of the family any one of them may make a payment on behalf of all. 'There is nothing in S. 20 of the Limitation Act to warrant the belief that the extended period of limitation is intended to operate only against the person making the payment.' The decision of Coxe, J. (as single Judge) in *Arjun Ram* v. *Rohima* [3] is scarcely reconcileable with this judgment and the learned Judge put it aside with the remark that 'it seems to have been a casual observation and not the decision of the Court.' We cannot quite agree with that. In the case before Coxe, J. the suit was to enforce a mortgage and a payment by the mortgagor's widow was relied on as saving limitation against the daughter's sons as well. The parties were apparently Mahomadans and on the footing that the 'widow and daughters were jointly liable to pay the debt,' the learned Judge held that the case was governed by the 'analogy' of S. 21 (2) of the Limitation Act and the decision in *Narayana Aiyyar* v. *Venkataramana* [4]. In relying on this last mentioned case, he has overlooked the distinction in operation, clearly indicated by the language of the sections, between 'acknowledgments' and 'payments.' And as for S. 21 (2), the case is at best one of 'analogy' so that other considerations are not excluded; and the well-established distinction between the position of 'joint' contractors and that of the 'co-heirs' of a *single* obligor has an important bearing on the question of the rule of limitation applicable to suits by or against such co-heirs (cf. *Ahimsa Bee* v. *Abdul*). [5] Reference may be made in passing to certain recent cases in which the question related to the effect of the acts of a Receiver. *Venkataramiah* v. *Subramanyam* [6], is a decision of a single Judge (Kumarasami Sastri, J.,) in which it was held that a payment of interest on a debt, by a receiver in a partition suit between the members of the family, he having been authorised by the court to make such payment, was sufficient to keep the debt alive against all the parties who were bound by the debts. In *Paramasivan Pillai* v. *Chakona* [7], the point arose in connection with an acknowledgment by a receiver in Insolvency. Phillips, J.,

1. (1905) I. L. R. 32 C. 1077.
2. (1906) I. L. R. 33 C. 1278.
3. (1912) 14 I. C. 128.
4. (1902) I. L. R. 25 M. 220.
5. (1901) I. L. R. 25 M. 26.
6. (1914) 26 I. C. 393.
7. (1916) 38 I. C. 169.

in the course of his Judgment, also refers to the English cases dealing with 'payments of interest' by receivers and indicates the test to be, whether, in making the acknowledgment or payment, the receiver acted *in contravention of the orders of the Court.* Oldfield, J. makes the test somewhat stricter, *viz.*, whether he acted 'under the orders of the Court.' But in any view these cases like those relating to guardians &c., proceed on the basis of an 'agency' by operation of law.

It only remains to notice *Velayudam* v. *Vythilingam* [1], where Benson and Sundara Ayyar, JJ. held that where the executant of a pro-note gave away *all* his properties to another, a payment of interest by the donor, even though made *after* the date of the gift, was operative to keep alive the right of the promisee to proceed against the universal donee as well. After referring to the language of S, 20 and to a number of cases, both English and Indian, the learned Judges add, 'Justice requires that a person who has received all the property of another without, it may be, the knowledge of his creditors, should not be at liberty to plead the Statute of limitation against them when the donor has kept the debts alive.'

Turning now to a few English cases which may help in some measure to elucidate the points raised *supra*:—We may first refer to *Forsyth* v. *Bristowe* [2]. In that case the assignee of the equity of redemption had paid interest on the mortgage-debt and in a suit on the covenant against the mortgagor, it was held that the payment by the assignee was effective to prevent the action from becoming barred. The assignee had covenanted with the mortgagor that he would himself pay the mortgage-debt and was accordingly held to be the agent of the mortgagor. It is not however quite certain whether the same view would be taken under S. 20 of the Limitation Act. (Cf. *Alagappa* v. *Subramanya* [3]). Baron Parke also referred to the circumstance that the English statute did not in terms require that payment of interest must be made by the party liable or his agent.

In *Pears* v. *Laing* [4], the material facts were these: A mortgaged a portion of his freehold V estate. He subsequently devised the whole of the V estate to F his son and his X estate to his daughters D and E. He left his other properties to trus-

1. (1912) 24 M. L. J. 66.
2. (1853) 8 Ex. Reports 716. s. c. 22 L. J. Ex. 255.
3, (1914) 26 M. L. J. 509. 4. (1871) L. R. 12 Eq. 48.

tees to pay debts including the mortgage-debt. One of the daughters D who was in possession of the X estate as devisee was till her death paying the interest on the V estate mortgage. In a suit to enforce the mortgage by sale of the mortgaged property and to have the deficiency made good out of the estate of the deceased mortgagor, it was held that the payment of interest by D sufficed to save the bar of limitation. Bacon, V. C. in his judgment cites the following passage from the judgment of Baron Parke as laying down the principle; "What we have to consider is the act of the person and not the position of the estate, for the existence or non-existence of the demand depends upon the act of the person and not upon the relative liability of the property." What is saved is the existence of the demand and not any particular remedy or kind of action. It may however be pointed out that under the English Statute on which this decision was given, the period of limitation was the same, both for the enforcement of the charge by sale and for the enforcement of the covenant as a specialty. In *Dibb* v. *Walker* [1], Chitty, J., held that a payment of interest by the tenant for life of the equity of redemption under a settlement made by the owner served to keep alive the action on the covenant as well. *Lewin* v. *Wilson* [2] turned on the effect of a payment by *one of two* mortgagors (who *inter se* however stood in the relation of principal and surety) each being separately entitled to his portion of the mortgaged property. The action was brought to enforce the obligation of the other mortgagor and the charge on his property and the Judicial Committee held that the payment by the one kept alive the remedy against the other as well, for the person paying was not a stranger but one who under the terms of the mortgage instrument was entitled to tender the whole amount of the debt and redeem the *whole* mortgage.

In *Bradshaw v. Widdrington* [3] the rule seems to have received a clear extension. J. E. B. mortgaged certain properties to one M but it was in fact as surety for his son. The son gave a bond to the father undertaking to pay he mortgage money himself and he accordingly made payments towards interest. The father sold a portion of the mortgaged property to another son of his, free of the mortgage, and the remaining portion was likewise sold by the father's executors. In an action against the purchasers to enforce

1. (1893) L. R. 2 Ch. 423. 2. (1886) L. R. 11 A. C. 639.
3. (1902) L. R. 2 Ch. 430.

the mortgage by sale of the property, it was held that the payment of interest by the son first mentioned was sufficient to save the action from the bar of limitation. *Newbould* v. *Smith* [1] was cited in argument but there is no reference to it in the judgment. The decision seems to have proceeded on the footing that the law will be satisfied if the payment was made by a person who as *between the mortgagor and himself* was bound to pay the debt *though not as between the mortgagee and himself.* It also holds that though the liabilities of the several parties may be different, the demand is by such payment set free as against all.

In *Howard* v *Lightfoot* [2] the question arose with reference to the effect of payment of interest by the specific devisee of part of a testator's estate in keeping alive the mortgagee's right of action against specific devisees of other parts of the real estate not subject to the mortgage. Vaughan Williams, L. J. held the principle of *Roddam* v. *Morley*, [3] to be that payment made by a person who is not a stranger to the transaction in interest binds those who are interested in the payment, to the extent of preventing the statute running. The case was followed and passages from the Judgment of the Court of Appeal quoted in *Velayudam* v. *Vythialingam* [4].

The result of the English Cases is thus stated in Halsbury's Laws of England:—'When several are at the same time jointly interested in the real estate of a debtor a payment by a devisee of part of such estate will not keep the debt out of the statute as against a devisee of another part except in cases where the debt is charged on land' (Vol. 19, p. 81). 'Payment of interest on a mortgage debt by a devisee of the mortgaged lands keeps alive the right of the mortgagee to resort to the residuary personal estate or the other real estate of the testator in the event of the security of the mortgaged lands proving insufficient' (Ibid. p 96.) As to the rights of simple contract creditors to enforce payment out of the real estate of a deceased debtor. 'payment by the heir or devisee will not bind the personal representative nor will payment by the latter, if he has divested himself of such estate, bind the heir or devisee. * * * * A payment by the devisee of the real estate of a deceased debtor or of part of it, in respect of a debt of his testator keeps the creditor's right alive as against all persons interested in

1. (1886) 33 Ch. D. 127.
2. (1907) L. R. 1 Ch. 330.
3. (1858) 1 De. G. & J. 1.
4. (1912) 24 M. L. J. 66,

the real estate. It seems that, if the right of a simple contract creditor against personalty is kept alive by payment of interest by executors the indirect right against the land by means of marshalling is also kept alive'. (Ibid. p. 74).

The principle as stated in *Howard* v. *Lightfoot* [1] is obviously wider than the language of S. 20 of the Indian Limitation Act and Mr. Rustomjee thinks, not without reason, that *Velayudam* v. *Vythialingam* [2] goes too far. On the question of the effect of payment by a principal debtor or surety in keeping alive the creditor's remedy against the other, three of the Indian High Courts have declined to follow the decision in *Allison* v. *Frisby* [3]. It remains to be seen how far Courts in India will follow English rules or precedents in dealing with the several classes of cases indicated in the course of this article.

SUMMARY OF ENGLISH CASES.

Nye *v.* Niblett: (1918) 1 K. B. 23.

Malicious Damage Act, 1861, S. 41—Malicious killing of animals—Animal ordinarily kept for a domestic purpose—Proof that a particular animal was so kept or was property of another person—Whether necessary.

S. 41 of the Malicious Damage Act provides that whosoever shall unlawfully and maliciously kill any animal not being cattle, but being ordinarily kept for any domestic purpose shall be guilty of an offence. Under the above provision, 3 boys were charged for having killed two cats in circumstances of great cruelty. No evidence was given on behalf of the prosecution to prove the ownership of the cats or to show that they were being kept for domestic purposes.

Held, the section only means that if you kill unlawfully and maliciously an animal which though not the subject of larceny belongs to a class of animals which as a class are ordinarily kept in a state of confinement or for domestic purposes then the offence is committed and that in such a case it is not necessary to prove who owned the particular animal so killed or that the particular animal was ordinarily kept in confinement or for some domestic purpose.

1. (1907) L. R. 1 Ch. 330.
2. (1912) 24 M. L. J. 66.
3. (1889) L. R. 43 Ch. D. 106.

Repton School Governors *v.* **Repton Rural Council**: (1918) 1 K. B. 26.

By-laws—Reasonableness of—Local Government—Building by-laws—Airs-pace at rear of new building—Public Health Acts Amendment Act, 1907, S. 23.

S. 23 of the Public Health Acts Amendment Act, 1907 provides that "for the purposes of this Act and the Public Health Acts, and any by-laws made thereunder, each of the following operations, namely :—

"(*a*) The making of any addition to an existing building by raising any part of the roof, by altering a wall, or making any projection from the buildings but so far as regards the addition only shall be deemed to be the erection of a new building".

By-law 12 framed under the Act provided that every person erecting a new domestic building should provide in the rear of such building an open space of not less than 150 square feet.

On a question raised as to the unreasonableness of by-law it was held that the by-law was unreasonable and as such bad if the effect in a given case which might be of frequent occurrence of construing a by-law in a particular way would lead to a result quite unnecessary for the protection of the Public Health and would impose a serious restriction upon the ordinary rights of a property owner with no good object, one would be entitled to say that the by-law is void, because it is unreasonable: one must be careful to see that the result is such as no one would desire and would in itself be absurd; but if it is found to be so, one is entitled and bound to say that such a by-law is bad for unreasonableness.

China Mutual Steam Navigation Company *v.* **Mlacay**: (1918) 1 K. B. 33.

Defence of the Realm Regulations 39, B. B. B.—Shipping controller—Duties and powers—Shipping—Requisition—Action against public officer in his official capacity.

The shipping controller by the new Ministries and Secretaries' Act 1916 has such powers as may be conferred on him by regulations under the Defence the Realm Consolidation Act 1914. By Regulation 39 B. B. B. the shipping controller may requisition or require to be placed at his disposal any ships in order that they may be used in the manner best suited for the needs of the

country and may require any requisitioned ships to be delivered to him at such times and places as he may require.

The shipping controller sent a letter under the above regulation to shipowners stating, (*a*) the steamers were requisitioned (*b*) the owners were to work them exactly as if they were still running in their own account, (*c*) and they were to run them in fact for the Government accounting to the Government for all net profits. In an action against the shipping controller for a declaration that notwithstanding the above letter the voyage was on account of the plaintiffs, the shipowners and that the plaintiffs were entitled to receive and retain the profits of such voyage: *held*, (i) that the regulation was not *ultra vires* the Defence of the Realm Act. (ii) The shipping controller has no power to requisition the services of the owners. The letter is *ultra vires* in this essential respect and cannot be supported. (iii) An action will lie against the shipping controller as defendant, though he is an officer of the State when his conduct is in question.

JOTTINGS AND CUTTINGS.

The Bolshevists and the Law:—Lawyers! Peter the Great is said to have exclaimed when he was told that the busy throng whom he saw in Westminster Hall were lawyers, 'why, I have only in my whole dominion, and I design to hang one of them the moment I get home!' An even stronger dislike of all things legal has been displayed by the Bolshevists. 'The Extremists' says two one of Reuter's correspondents in Russia, 'have abolished all the existing Law Courts, and also the Bar'; and from the same source has come the supplementary announcement that 'the Commissioners of the people intend to set up Law Courts comprising soldiers, sailors, workmen and workwomen, from among those most devoted to the people.' Revolutionaries seldom fail to allow their hatred of existing institutions to extend to Judges and Advocates. 'The first thing we do,' said Jack Cade, 'let's kill all the lawyers.' That, in some degree or other, is invariably the attitude of those who are opposed to law and order, but it is an attitude which the revolutionist never fails to abandon when he succeeds in re-constructing the society of which he forms a part. Scarcely less regard was paid to legal institutions in the

French Revolution, but out of that fierce confusion there eventually emerged, under the strong guidance of Napoleon one of the greatest codes of law the world has known. Although the Bolschevists, in their eagerness to destroy, have abolished the Courts and the Bar, the Russian cataclysm may eventually be followed, not only by a restoration of the only means by which the rights of citizens may be determined, but also by a legal code that will materially assist the administration of justice in a country which hitherto has not been conspicuous for the certainty or equality of its laws.—*The Law Journal.*

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The Supremacy of the Law :—Lord Robert Cecil, speaking last Sunday at the great Zionist demonstration on the Government's declaration of policy for Palestine, put in a new form the common description of the two main foundations upon which the policy of this country has always been based—liberty and justice. 'Perhaps', said he 'they might be more accurately called liberty and the supremacy of the law.' And like the sound constitutional lawyer and student of history that he is, he claimed that, if we are ever to obtain that security which we have recently been told is so all-important to us, 'it must be by the same means by which we have secured liberty and happiness in our country, namely by the supremacy of the law.' That was well said, and lawyers will welcome the declaration. It gives the law—fixed law, and not any nebulous idea of justice—its rightful place in the scheme of civilization, and adds a new dignity to its study and its practice.—*Ibid.*

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The Remuneration of Solicitors :—While the Council of the Law Society are seeking to obtain an increase in Solicitors' charges during the war—an increase, it is understood, of 25 per cent—the Committee of the Liverpool Law Society, while sympathising with this endeavour to obtain a war bonus, are raising the question of a permanent change in the principles on which the remuneration of solicitors is based. One of their main proposals is that the system of remuneration by scale charges should be extended. They claim that

"From the Solicitors' point of view the system saves labour and trouble, and will, on the whole, prove more remunerative by abolishing the anomaly that remuneration should depend, not on the values involved, but on the length of documents and number

of interviews necessary in a particular matter. It is believed also that it will prove acceptable to clients by substituting for an uncertain charge, a charge varying according to value involved. The system is also the one familiar to the client in the case of almost all other professional and business charges."

We agree with the President of the Liverpool Law Society a report of whose presidential address will be found in another column, that it is absurd that the remuneration of a solicitor should still largely depend upon the prolixity of the documents he draws—a brief, for example—rather than upon the skill he exercises and the importance of the matters with which he has to deal. The supreme merit of *ad valorem* charges is that a client knows exactly how much he will have to pay. It is not so much the costliness of legal proceedings as the uncertainty of their cost that deters so many members of the public from resorting to them. How very absurd the present system it has been aptly pointed out by Master King in the preface to his work on "Costs on the High Court Scale."

"Costs are a peculiarly British institution. No other country pays its lawyers in the same fashion, and in particular no other country has such an extraordinary difference in the mode of payment between men who think and the men who talk, between the men whom the suitors see and the men to whom the Judges listen. Nor is this distinction the only peculiarity in our mode of legal remuneration. Under it, through various causes, but principally from an inordinate application of the maxim, *via trita via tuta*, solicitors are largely dependent for their living upon the allowances which are framed upon the paradoxical principle of paying them for things they don't do by way of compensation for not paying them for things they must do."

Although, as the President of the Liverpool Law Society has pointed out, the system of remuneration in conveyancing matters was changed in the midst of the Napoleonic wars, yet it can hardly be expected that a radical change in the principle of remuneration, both in contentious and non-contentious matters, could be introduced during the present war, but it will certainly form a fitting part of the legal reconstruction that will come with peace, and the Committee of the Liverpool Law Society are rendering a useful service in affording the profession an opportunity of formulating their ideas on the subject.—*The Law Journal.*

The Kaiser and Lawyers.—At the Lawyers' Club in New York on December 15, Mr. Gerard, the former Ambassador in Berlin, told an interesting anecdote illustrating the contempt which the German Emperor entertains for lawyers. In a notable interview the Kaiser took the opportunity to express to Mr. Gerard his hatred and contempt of them. "After shaking his finger in my face," said Mr. Gerard, "and telling me he would stand no nonsense from America after the war" the Monarch shouted, "All the people who are opposed to me are lawyers. Lloyd George, Asquith, Poincare—they are all lawyers."—*Ibid.*

CONTEMPORARY LEGAL LITERATURE.

The *November* issue of the *Harvard Law Review* is devoted to the remarkable article of M. Duguit on Law and State. It is a powerful protest against the current doctrines of State. The writer examines in succession, the conceptions of State according to Rousseau, to the declaration of the rights of man and citizen of 1789, according to the German and French Metaphysical schools as well as the realistic schools of the same countries and shows their utter inadequacy. State according to Rousseau is omnipotent and the way in which he reconciles that omnipotence with the freedom of the individual does not in any way affect its omnipotence. The restrictions imposed by the State upon the individual are according to him, not really restrictions because those restrictions are imposed by the individual upon himself though no doubt, in association with others as units of the organisation known as State. This extreme view in its totality was accepted by French writers of no school but it found favour with the German Philosophers like Kant and Hegel and German jurists like Jhering and Jellinek. Though a certain class of French thinkers do agree with these in looking upon the State as a natural organism or person, they consider the rights and powers of the State as being subject to certain inalienable and indefeasible rights of the individual. This idea is thus expressed in the declaration of rights of 1789: "The end of all political association is the conservation of the natural and indefeasible rights of man." Though some of the jurists of the German Metaphysical school that is to say, according to the terminology of the writer the school

that regards State as a person or organism, recognise the limitations, the later and the more recognised jurists do not seem to recognise any such, except in so far as the State itself chooses to recognise in its wisdom dictated by necessity or enlightened egotism The influence of this school has led to the moral bankruptcy of Germany exhibited in her international relations during the present war. The German realistic school headed by the Bavarian writer Seydel repudiates the idea of personality imputed to the State which it regards a mere metaphorical expression and looks upon the State merely as a political association of individuals for a distinct end but even that school asserts the omnipotence of the State. The present day French writers like Mr. Benvist and Esmaine whose views, M. Duguit claims to perfect repudiate equally the idea of Sovereignty and Omnipotence. M. Duguit throws overboard all notions of subjective right, autonomy of the individual and sovereignty of the State. As Auguste Comte wrote "each has duties in relation to all; but no one has any right properly so called. In other words no one possesses any other right than that of always doing his duty." Neither has the State a subjective right to command nor have the individuals subjective rights of liberty and property but all the governing and the governed are submitted to the jural principle, founded on social interdependence and by the application of this jural principle all individual wills—the wills of those who govern as well as the wills of those who are governed —find themselves placed in a certain situation which we call, an objective or legal situation, implying in a general way the obligation upon every one to co-operate according to his position in the maintenance of social solidarity and to do nothing which constitutes an interference with it. Positive law cannot derive its obligatory force from a supposed commanding power of those who govern. Positive law is imperative when it realises the jural principle or puts it into practice; it is imperative only when it has the one or the other of these two characteristics which indeed are only one and only in the measure that it has them. State is a differentiated Society in which the strongest must employ the force at their disposal to assure the accomplishment of certain services for the benefit of all. The will of those who govern has no force as such; it has value and force only to the extent that it makes for the organisation and the functioning of public service. Thus, the notion of public service comes to replace

that of sovereignty. The State is no longer a sovereign power which commands ; it is a group of individuals having in their control forces which they must employ to create and to manage public service. The notion of public service becomes according to this theory the fundamental notion of modern public law. The writer of a note on M. Duguit's article in the *Review* says that the views of M. Duguit have excited comment in a manner almost unprecedented. It has divided the lawyers whose work verges on political speculation into hostile camps. Some fiercely deny its truth either as a statement or induction and urge that it would result in anarchy while others like M. Berthelemy have not hesitated to adopt alike its methods and conclusions. Others again seem to reach not very different results by very different methods. A whole school of legal thinkers are clearly influenced by the speculations of the writer. Undoubtedly the writer's views are highly interesting and, if accepted, should profoundly affect many an accepted political opinion in England and elsewhere.

BOOK REVIEWS.

THE INDIAN STAMP ACT, *by Desai Narotam, 3rd edition, Price Rs. 9.*

We have great pleasure in announcing the publication of the 3rd annotated edition of the Indian Stamp Act by Mr. Desai Narotam, pleader, High Court, Bombay. The book under review is so well known to the legal public that it does not require many words from us in commending it. We would only draw the attention of our readers to the fact that in the present edition the amendments of the Act, notes of cases, rules, notifications etc. have been brought down to the end of 1917.

THE PROVINCIAL SMALL CAUSE COURTS ACT, *by K. J. Rustomji, published by Butterworth & Co. Price Rs. 6.*

It is with great pleasure that we inform the members of the Bench and the Bar of the publication of the Commentaries on the Provincial Small Causes Courts Act, by Mr. Rustomji, the well known author of 'Indian Law of Limitation which has within so

short a time taken the foremost place among the up-to-date Commentaries on the Limitation Act. We have carefully gone through some portions of the volume under review, and we can confidently say that it maintains the high standard of accuracy which has been associated with the name of the author. It is hardly necessary to mention that the cases have been subjected to careful criticism wherever necessary and the author has made useful suggestions of his own on many points. The case law has been brought down to the end of October 1917. We have every reason to believe that this book will find a prominent place in the library of all lawyers and judges.

The Madras Law Journal.

PART XII.] MARCH, 1918. [VOL. XXXIV

MALABAR LAW: INDIVIDUAL PROPERTY AND SUCCESSION.

In *Kanakan Isvaran Kandan* v. *Sirkar* [1], two classes of heirs are mentioned: one, descendants of great-great-grand-mother downwards of a deceased person between whom and himself community of property existed and who are called Anandravans or seshakars; secondly those who claim from more remote female ascendants and who are known as Kuttukars or Dayadies. The property escheats to the Crown only on failure of both these classes of heirs but the Crown has a claim for adiyara-fees in the case of the second class of heirs. (See also *Kunjan* v. *Ulahaunan Ouseph*[2].) The classification, it will be noticed, is a clumsy adaptation of the Hindu Law rule as to Bandhus, with a graft from the rule as to co-parcenery ceasing with the great grandson. In fact there seems to be no limit, either under the Hindu Law or the Marumakkattayam Law, within which alone co-parcenery can exist and the rule is obviously one for revenue purposes. In *Raman Govindan* v. *Raman Raman* [3], the doctrine of lapse as laid down by Holloway, J., in *Kallati Kunju Menon* v. *Palat Erracha Menon* [4], was accepted as sound law and it was further elaborated in *Lekshmi Narayan* v. *Eachooty Mathevi* [5], in its application to divided Kootukars or dayadies. It was laid down in that case, that the property of the last surviving member of a Tarwad would, on his or her death, lapse jointly to the Tarwads having community of pollution or pula sambandam, the nearer excluding the more remote, nearness being however determined not by degrees of propinquity alone but also by the circumstance as to who divided off last. If the Tarwad in which the succession vests is divided into Tavazhis or branches without community of rights, the branches might *inter se* enforce division of the property. *Raman Govindan* v. *Raman Raman* [3], was dissented from in *Panapilla Jankapillai Narayanpillai* v. *Kanakku Krishnan Narayanan* [6], as

1. (1882) 2 T. L. R. 38.
2. (1899) 17 T. L. R. 117.
3. (1899) 15 T. L. R. 57.
4. (1864) 2 M. H. C. R. 162.
5. (1899) 17 T. L. R. 69.
6. (1906) 22 T. L. R. 278. (F. B.)

regards certain classes of property and was ultimately overruled in *Sakli Kerulan* v. *Sakthi Sakthi* [1], where it was held that the self-acquisitions of a member devolve on the thavazhi and not on the Tarwad. "If propinquity is the test for heirship in Marumakkatayam law to a property left by a Marumakkattayee last survivor who had absolute power of disposal during his life-time over that property" argue the majority consisting of Sadasiva Iyer, C. J., and Hunt, J., "the logical result is that the law of inheritance as to self-acquisitions should also be based on propinquity of relationship, the only limitation imposed being that the legal person that inherits should be or represent a Thavazhi and not inherit as a mere individual." Even here it will be noticed we are under the spell of doctrine of lapse though in a more qualified form. That there should be individual heirship at some stage could not be helped for instance when all the members of the Tavazhi are divided from each other. Even then the learned Judges would apparently first notionally transfer the property to the Thavazhi and then divide the properties between the various members. How that division is to take place, whether according to the Sub-Thavazhis it may consist of or according to the number of members, is in itself a problem to be determined according to the view one is inclined to take of the rights of individual members at a partition of the family property. How much of the theory enunciated in *Lakshmi Narayani* v. *Eachooty Mathavi* [2] survives *Sakthi Kemlan* v. *Sakthi Sakthi* [1] has not apparently yet been the subject of any decision in Travancore. Under the Hindu Law, as between the descendants of a co-parcener, the status of non-division is a ground of preference. The right of the descendants by birth forms the basis of that preference under the Hindu law. Group succession would seem to be a circumstance in favour of its recognition under the Malabar law in all cases, but the rule of succession by the Thavazhi being a rule of succession and not a rule of survivorship in any form, preference of individual members of the Thavazhi on the ground of non-division would, indeed, be an anomaly. Preference on the ground of being the latest to be divided off, from the propositus is a fanciful elaboration for which there is no analogy whatever in the Hindu Law.

Under the Aliyasanathana Law of South Canara, the effect of decisions is that property goes to the nearest Thavazhi

1. (1908) 24 T. L R. 102. 2 17 T. L. R. 69.

Antamma v. *Kaveri* [1], *Manjappa Ajri* v. *Marudevi Hengeru* [2] and it is assumed in *Timma* v. *Daramma* [3] that if several divided Thavazhis become entitled, they take equally and as tenants in common. (See *Madhevi Amma* v. *Kunhunni Menon* [4] for Malabar Law.)

In this matter, the Malabar Law as administered at present is in an unsatisfactory condition. The doctrine of lapse laid down by Holloway, J., in spite of the destruction of its theoretical basis in the Sivaganga case managed to survive in many an *obiter dictum* and was upheld by the Full Bench in *Govindan Nair* v. *Sankaran Nair* [5], by a majority, by Sir *Arnold White, C. J.*, on the ground of *stare decisis* and by *Abdur Rahim, J.*, on the ground of custom. The authority of this decision is considerably shaken by the decision in the later Full Bench in *Chakkara Kannan* v. *Kunbi Pocker* [6], which vigorously combats the view and rejects it so far as succession to the property of females is concerned. As it is, in the case of males, the rule of lapse to the Tarwad obtains, but in the case of females, the rule of succession to the Thavazhi obtains. Even in the case of males, property acquired out of the savings of Putravakasam property or joint acquisitions of the members of the branch would be taken by the Branch and not by the Tarwad, *Komu Nair* v. *Ittiath Amma* [7]. The effect of the later Full Bench is to restrict the application of the decision of the earlier Full Bench to cases in which there is a Tarwad undivided from the propositus and renders inadmissible the elaboration of the doctrine of lapse contained in *Lakshmi Narayani* v. *Eachooty Madhavi* [8]. The point was raised in S. A. 1811 of 1915 but their lordships did not express a final opinion though their inclination was against it. The actual decision was when a family divides most of the properties belonging to it, it is divided in status and the properties so divided and subsequent acquisitions therewith go to the Tavazhi though in respect of the undivided property it may be, the whole Tarwad continues joint in status. The best analogy to the doctrine of lapse afforded by the Hindu Law is the *usage of survivorship* obtaining in zamindaris and in respect of it the latest decision of the Privy Council is that when there is a

1. (1884) I. L. R. 7 M. 575.
2. (1915) I. L. R. 39 M. 12.
3. (1887) I. L. R. 10 M. 362.
4. (1893) 4 M. L. J. 13.
5. (1909) I. L. R. 32 M. 351.
6. (1915) I. L. R. 39 M. 317. F. B.
7. (1900) 10 M. L. J. 59.
8. 17 Tr. L. R. 69.

division of status in the family, *i. e*, to say in respect of all the partible parties, the usage of *survivorship* in respect of the impartible estate ceases and the property thereafter descends like ordinary separate property (*Tarakumari* v. *Chaturbhuj Narayan Singh*[1]) and there cannot be any justification for appealing to the doctrine of lapse for the purpose of giving preference to the Tarwad, much less any particular section of the Tarwad as being the last to divide off from the propositus. The decision of the Privy Council in *Sivagnana Tevar* v. *Periasami*[2], is authority for excluding properties in respect of which there has been a division from the operation of the doctrine of lapse though there is a tarwad in existence joint and undivided in respect of the bulk of its properties. The rule of succession as distinguished from the rule of survivorship or lapse is that property descends to one's own descendants (which is possible only in the case of females), in default, the mother's Tavazhi, *i. e.*, mother and her descendants, in default to the grandmother's Tavazhi and so forth. Where it should stop, it is difficult to say but it may be assumed as in the Travancore cases that the limits for purposes of pollution mark also the limits for purposes of inheritance though the right of inheritance may not depend on the right or duty to make funeral offerings.

Under the Travancore Law, a convert would lose all rights of inheritance; but, in British India, he will have to be treated as a divided member and his rights determined on that basis. That is to say, in cases where the doctrine of lapse applies and even in other cases, if his Tavazhi is undivided from the deceased he may be cut off as any other divided member is. So far as the rights of succession to the property of the convert are concerned those would be determined by the law to which he is subject and if under that law mothers, brothers or sisters or the descendants of the mother or sister though of another faith are entitled to take, we do not believe the fact that legal marriage is not recognised among the Malayalees would stand in the way of their inheriting the property. It may be too much however to expect those systems to recognise the descendants of the males when the law by which these are governed does not recognise heritable relationship. The ground is wholly untrodden ground and naturally we have to speak with considerable reserve.

1. (1915) I. L. R. 42 C. 1179. 2. (1878) I. L. R. 1 M. 312. (P. C.)

Again, there are piebald systems of inheritance like that of Moplas or Tiyas which, on account of the complications they present have to be dealt with separately.

Ss. 23 and 24 of the Malabar Marriage Act also introduce certain variations in the ordinary law of inheritance. S. 23 says where a man following the Marumakkathayam or Aliyasantana Law of inheritance dies intestate in respect of his self-acquired or separate property or any portion thereof, one half of such property or in the event of no member of his Tarwad surviving him the whole of such property shall devolve on his widow if he leaves no children or on his children in equal shares if he leaves no widow or on his widow and children in equal shares if he leaves both widow and children; S. 24 says where a woman following Marumakkathayam or Aliyasantana law of inheritance dies intestate in respect separate or self-acquired property or any portion thereof one half of such property shall devolve in equal shares upon her children and in the event of no member of her Tarwad surviving her the whole of such property shall devolve on her husband. S. 2 defines children as sons and daughters of parents whose sambandham has been registered under the Act whether born before or after such registration. In the case of any one whose personal law permits adoption children include adopted sons and daughters. These sections it will be noticed form a serious departure from the ordinary rules of inheritance. But as they have a restricted operation no question has yet arisen under these sections.

It has been decided under the Aliyasanthana Law that leprosy and insanity which are recognised as grounds of exclusion under the Hindu Law cannot be regarded as such under that system. *Chandu* v. *Subba* [1], *Sanku* v. *Puttumma* [2]. As stated in *Sanku* v. *Puttumma* [2] "the test in such cases under the Hindu law is whether the defect is such as would be sufficient to prevent the claimant from offering the funeral oblations. Right of succession under the Aliyasanthana Law is in no way dependent on the capacity to offer funeral oblations." There is no reason why the Malabar Law should in this matter differ from the Aliyasanthana Law.

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1. (1908) I. L. R. 13 Mad. 209.   2. (1890) I. L. R. 14 Mad. 289 at p. 293.

SUMMARY OF ENGLISH CASES.

Hawkey v. Stirling. 1918 (1) K. B. 63.

Sunday Observance Act, S. (1)—Amusement caterer—Sale of goods—Tradesman.

Section (1) of Sunday Observance Act provides that "No tradesman, artificer, workman, labourer or other person whatsoever, shall do or exercise any worldly labour, business or work of their ordinary callings upon the Lord's day or any part thereof (works of necessity and charity only excepted)".

An amusement caterer who carries on business on week days and Sundays at premises where any one who chose played at certain games paying the amusement caterer for the implements used in such game or where the player gets from the caterer some article on achieving a certain result is a tradesman within the meaning of the section and liable to conviction.

Rex v. London Committee Council : Ex parte Corrie. 1918 (1) K. B. 68.

Mandamus—By-law—Consent at the discretion of Public Authority—Resolution to refuse consent—Whether mandamus lies.

Where under a By-law made in exercise of statutory powers, a Public Authority is to grant permission at its discretion to do certain acts and the Public Authority passed a resolution that all existing permissions should be determined and that no new permissions should be granted thenceforth, such discretion is not properly exercised by passing a general resolution to the above effect and acting thereon and Mandamus will lie against the Public Authority for the proper exercise of the discretion in individual cases.

JOTTINGS AND CUTTINGS.

Authority to compromise.—According to the practice books, a solicitor has general authority to compromise an action, *unless expressly prohibited* (Annual Practice, 1918, pp. 1912 and 1961); and it would seem that the same general, but limited, authority extends to a solicitor's agent while engaged in the conduct of proceedings. But if Mr. Justice McCardie is right in the

considered judgment which he delivered the other day in a rather curious action (Welsh *v.* Roe; January 17), the authority is wider than this, and there is no limitation once the action has been placed in the solicitor's hands. In the learned Judge's opinion "It is clear that a solicitor has an implied authority to compromise the action, and that no limitation on such implied authority avails the client unless such limitation be brought to the notice of the other side." That was decided so long ago as 1696 in *Latuch* v. *Pasherante* (6 Salk, 86), and there are later judgments of Wilde, C. J. and Campbell, C. J. to support the same proposition. But the more recent authorities have not gone so far, and there are numerous cases both in the Common Law and Equity Courts where the question of prohibition of a settlement, or of a compromise only on certain clear conditions, has been seriously entertained (cf. *Hickman* v. *Berens* 1895), and compromises been reopened though made in open Court by counsel, who are supposed to have even wider powers than solicitors. In the latest case (*Little* v. *Spreabury*, 1910) the Court (Bray and Coleridge, JJ.) carefully refrained from deciding the point, but the judgment there proceeded on the assumption that if there were an express prohibition the party dissenting would not be bound. That is still perhaps the safest line to take notwithstanding Mr. Justice McCardie's judgment, for there was no allegation in the action before him that the solicitor had acted in defiance of any prohibition, and his observations on that point may be regarded as *obiter.—The Law Journal, 26th January, 1918.*

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The Lord Chief Justice's Leave-taking :—The impressive ceremony in the Lord Chief Justice's Court, when the Solicitor-General, on behalf of the Bar, wished the Earl of Reading 'God speed' in the great task he has undertaken in America, was a conclusive answer, so far as the legal profession is concerned, to the suggestion that the Lord Chief Justice ought not to have accepted his temporary position as High Commissioner in the United States without resigning his judicial office. The presence of the judges, as well as the large gathering of the Bar, was ample proof—if, indeed, proof were needed—that in the opinion of those best qualified to speak on such a matter, the traditions of the office of Lord Chief Justice will not suffer by Lord Reading's temporary relinquishment of its duties for the purpose of render-

ing a great national service in another, and in these momentus times, not less important sphere. There is, in truth, something that is analogous between the duties which the Lord Chief Justice ordinarily performs and those which he has been chosen to discharge in 'the greatest cause.' As he himself observed, in replying to Sir Gordon Hewart's address, he will still be engaged in America, 'in the administration of justice, and in the preservation of liberty according to the laws of humanity and civilisation.' The whole profession, not without a feeling of pride that one of their member has been chosen for so responsible a post, will, as the Soliciter-General remarked in his very felicitous speech, look forward eagerly to welcoming the Lord Chief Justice at the earliest moment on his return, especially if, as the whole nation hopes and believes, his labours in America help to bring about 'the peace which is victory, and the victory which is lasting peace.'—*Ibid., 19th January, 1918.*

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'*The Freedom of the Seas.*' Simple and unchallengable as the proposition 'the freedom of the seas' appears to be it is really as ambiguous as the old 'Rights of Man.' What are 'rights'? What is 'freedom'? President Wilson's latest pronouncement on the war aims of the Allies, with its formula "Absolute freedom of navigation upon the seas outside territorial waters, alike in peace and in war, except as the seas may be closed, in whole or in part, by international action for the enforcement of international covenants', is the best answer which has yet been given to the modern query. America has always been foremost in the demand for the free use of the world's highways in war as in peace, but she has hitherto been practically free from the chances of war outside her coasts, and it is only now, when she is involved as a belligerent in such a conflict, that she can appreciate the full consequences of the claim. The general assent which has been accorded to the President's statement promises the removal at the next Peace Conference of one of the stumbling blocks of diplomacy, and we shall welcome it, as we did the Declaration of Paris after our last great war, because it will relieve England, as the greatest of maritime powers, of a fruitful cause of misunderstanding with other nations. It will also have the great advantage of frustrating in future the attempts of rivals like Germany to foster suspicion and jealousy of the

maritime predominance which is necessary and natural to us as an island power. We desire, not less than other nations, to make the sea, as it originally was, perfectly free, thought not in the original sense—which, as Maine remarked, was that of 'being universally open to depredations.' Grotius is usually acclaimed by Continental writers as the founder of the modern claim to freedom of the seas, but, as Sir John Macdonnell has recently reminded us, our own Queen Bess was the first true defender of the principle, and her victory over the Spanish Armada was a victory for maritime freedom all the world over. So perhaps when the present hostilities cease, a new Declaration of London or of Washington, based on the American President's formula will prove to all the world that with us the freedom of the seas is no mere phrase, but stands for that full freedom which, not our own arbitrament, but the judgment of the common league of Nations will set up for all peoples.—*Ibid.*

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The Lord Chief Justice's Mission :—Having already eclipsed all other records on the Bench in so many respects, it is no great matter of wonder that the Earl of Reading, as Lord Chief Justice, should courageously take on himself the mission of high political importance to which he is called by command of the King and the desire of the two great English democracies. The petty objections which have been raised in some quarters to the Chief Justice's appointment as the "King's High Commissioner in the United States in the character of Ambassador Extraordinary and Plenipotentiary on Special Mission," on ground of incompatibility between the two offices will find no support in legal circles. On the contrary, it is generally recognised that, great as are Lord Reading's administrative qualities, and valuable as has been his reforming influence in the Courts, there is no special call for these functions in the present disturbed times, while the devotion of all his powers to the unification of the effort between the two Governments is the greatest service which he can now render to the State. There is, indeed, something of poetic justice in the appointment of the successor of Mansfield to undertake this harmonizing task in the crisis which has again welded together the two peoples, whose separation was so largely contributed by the political activity of the "silver-tongued" maintainer of the Mother Country's "rights." The key to the Temple of Peace now lies, we are assured, in the Capital at Washington; and it is

a happy fate which takes there another great advocate and Chief Justice to guide men's minds, and direct their energies, to the opening of the gates.—*Ibid., 12th January 1918.*

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The Limits of Cross-Examination.—Is an advocate entitled to put a question to a witness suggesting imputations upon his character merely because he has been instructed to do so? At the instance of Judge Graham, K. C., who had before him at the Bow Country Court several months ago a case in which a barrister, in cross-examining the defendant, suggested that she had been guilty of immoral conduct, the Bar Council have laid down five rules for the guidance of counsel in such matters, based upon the material sections of the Indian Evidence Act, 1872, framed by Sir James Stephen. They say—to summarise the rules that questions attacking the character of a witness ought not to be asked unless the advocate has reasonable grounds for thinking that the imputations they convey is well founded; that instructions by a solicitor to put such questions may be regarded *prima facie* by counsel as reasonable grounds for believing the imputations to be true; that no statement of any person other than a solicitor should be so regarded unless he can give satisfactory reasons for his statement; that such questions, whether or not the imputations they convey are well-founded, should not be put if the advocate is of opinion that they would not materially affect the credibility of the witness or relate to matters so remote in time or of such character that they could not have that result; and that "in all cases it is the duty of the barrister to guard against being made the channel for questions which are only intended to insult or annoy either the witness or any other person, and to exercise his own judgment both as to the substance and the form of the questions suggested to him." Such rules must necessarily be somewhat wanting in particularity, but the last one is really the conclusion of the whole matter. Cross-examination is the most powerful weapon in the armoury of the advocate, and any unbecoming use of it, therefore, is all the more regrettable. He cannot, of course, be expected to investigate personally all the statements and suggestions he is instructed to make, but if he acts within the spirit of the Bar Council's final rule—if, in other words, he remembers that he is not a mere

hireling whose function is to make himself the channel of the malice or mendacity of his client the traditions of the profession are never likely to suffer at his hands. *Ibid., 12th January, 1918.*

CONTEMPORARY LEGAL LITERATURE.

A writer in the *Minnesota Law Review* for December 1917. contrasts the Practice and the Law of the Prize Courts of England and Germany. While in England, the Prize Court is but one of the ordinary Courts of the land (though appeals lie to the Privy Council) in Germany it is an *administrative* Court composed only partly of lawyers, the others being Naval, Military and Political Officers. National feeling runs high even in ordinary courts in times of war and it may naturally be expected to affect these administrative courts in a much higher degree. The procedure however of the German Courts is more liberal than the English in this sense that it places no restriction on alien enemies appearing in Courts and pleading their causes either personally or by attorney. The law administered in the English Courts is the international law subject to the ultimate authority of the Parliament and the authority of the King in Council to issue ordinances at variance with international law has been authoritatively denied in the Zamora Case. In Germany, on the other hand, the law administered is in the first instance, the Imperial ordinances and it is only in their absence that recourse is had to international law. In this there is room for apprehending increasing danger to neutral and alien interests. The writer, therefore, urges the establishing of an international world tribunal to deal with those claims.

Another writer in the January part of the same Journal discusses the feasibility of a uniform procedure in all the American Courts subject to modification from time to time by the Supreme Court after the English plan. In America all such questions are complicated by the constitutional questions regarding the powers of States *inter se* and the federal Legislature, the powers of the Congress and the Courts, and the fundamental rights preserved by the charter. The writer shows that none of these present any difficulty in the way of the realisation of this ideal which has the support of most Bar Associations in the country. The sole object of any procedure system should be at the lowest the ascertainment of a just and speedy decision upon the merits according to the principles of substantive law, at the lowest practicable cost, of all

disputes between litigants. How far it is from this ideal being realised in America in criminal cases can be gathered from an article in the Canada Law Journal where it is stated that compared with the murders committed and the number of trials, the acquittals stand highest in America, doubtless due to the great value attached to forms and technicalities there.

Another article in that Review, discusses the power of the Congress to restrain individual liberties and rights reserved by the American Constitution in view of the exigencies of the war. The writer is inclined to the view that it has such power.

In the Canadian Law Times for December 1917, there is an attempt made to differentiate, in the light of the decisions, the degree of care required in the case of licensees, invitees and trespassers. Towards invitees the law insists on reasonable care while it expects bare licensees to take the premises in the condition in which it is, the licensor being liable only if he is guilty of laying a "trap". In the case of trespassers, there is liability only in the case of intentional wrong.

In the Harvard Law Review for the same month Mr. Kales discusses how far contracts in restraint of trade are recognised in America. A contract not to engage in a given business or occupation is assumed to be void where the promisor is already engaged in it and the promisee is not and does not intend to be. The rule does not apply to businesses which though the state regards as lawful, nevertheless considers opposed to public interests such as the liquor business. Restrictive covenants accompanying the promisor's entry into an appenticeship arrangement or made upon his entry into the service of the promisee for the purpose of learning a trade or business are also upheld provided that the restriction is not broader than the business of the master. Similarly restrictive covenants accompanying the sale of a business provided here also the restriction is operative over a less area than that of any state where the restriction applies. In the case of covenants not to carry on a business given by one in the business to another in the business or intending to enter it would be valid subject to this exception *viz.*, that it would not be upheld if it involves the letting down and standing idle of valuable plant. If the plant is purchased also, the covenant will be good.

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REVIEW ON THE GROUND OF NEW EVIDENCE:—A CRITICAL NOTE.

[*Nandalall Mullick* v *Panchanan Mukerjee* [1].]

Two questions arising under the law relating to *review* were considered in the above case *viz.*, (i) the nature of the evidence requisite to justify a Court in granting a review on the ground of its discovery and (ii) the powers of an Appellate Court to interfere with an order granting a review on this ground. On the first, the learned Judges adopt the rule laid down in certain recent cases in England, as governing motions for 'new trial,' *viz*, that the *new* evidence relied on must be such as, if produced at the trial, would have been *conclusive* in favour of the applicant. As to the second, they hold that 'strict proof' in O. 47, R (2) (*b*) merely means 'legal evidence' and that if the Court below had before it legal evidence as to the circumstances of the 'discovery' a court of appeal ought not to interfere with its discretion in granting a review or consider the 'sufficiency' of the proof as to the applicant's diligence. We cannot help feeling that the view as above stated unduly narrows the scope of the beneficent provisions of the statute on both the points mentioned. The respect due to the considered opinion of the learned Judges and the practical importance of the subject necessitate a careful investigation of the principles on which the rules of the Indian Procedure Code on this matter rest and the applicability thereto of the analogy and restrictions of the law relating to 'New trials' in England.

It may be useful to recall that the law and practice as to 're-hearing—using it as a convenient generic term—in the Courts of Record in England, has grown up under the constant influence of *two* important factors, one, the divergent jurisdictions of the Common Law Courts and the Chancery and the other, the division of functions between Judge and jury. The practice of 'rehearing' in chancery seems to have owed its origin to the circumstance that there was no appeal from the Lord Chancellor to any higher

1. (1917) I. L. R. 45 C. 60,

tribunal, so that any injustice arising out of his decisions could be remedied only by himself correcting his own or his predecessor's orders. The matter was regulated by General orders and as early as Lord Bacon's time it was settled that a decree *once enrolled* could be reversed or altered only upon a bill of review and that no bill of review shall be admitted 'except it contain either error in law appearing in the body of the decree without further examination of matters of fact or some new matter which hath risen in time after the decree and not any new proof which might have been used when the decree was made; nevertheless upon new proof that is come to light after the decree made and could not possibly have been used at the time when the decree passed, a bill of review may be grounded by the special license of the court and not otherwise.' *Prior to enrolment* of the decree or order, any error therein might have been rectified on a mere petition of re-hearing. (See per. Cozens. Hardy L. J. in *Charles Bright and Co. Ltd.* v. *Sellar* [1] per Lord Hardwicke in *Norris* v. *Le Neve* [2]). The like power came, in course of time, to be exercised by the Lord Chancellor's deputies as well, *i. e* by the Master of the Rolls and the Vice Chancellor. There was however nothing analogous to this in the Common Law Courts (per Thesiger, L. J., in *In re St. Nazaire Company* [3]) and after the fusion of practice effected by the Judicature Acts it would appear that no division of the High Court has power to review or re-hear a case after judgment had been passed and entered (*ibid.* see also per Romer, J., in *Ainsworth* v. *Wilding* [4]). The jurisdiction to review being substantially in the nature of an appellate power, such part of that old jurisdiction as at all remains now belongs to the Court of Appeal, subject however to the possible right of a suitor to get similar relief in certain circumstances, by an independent action corresponding to the old bill of review (*See Boswell* v. *Coaks* (*H. L.*) [5] *Birch* v. *Birch* [6].) The Common Law Procedure was dominated by the finality attaching to the verdict of a jury. The Court could not ordinarily disturb it, the aggrieved party could only move for a new trial; (Compare *Davies* v. *Felix* [7] with *Potter* v. *Cotton* [8]) and it required the intervention of the Legislature to empower the Court of Appeal in certain circumstances to enter judgment for one or other of

1. (1904) 1. K. B. 6.
2. (1743) 3 Atk. 26.
3. (1879) L. R. 12 Ch. Dat. p. 101.
4. L. R. (1896) 1 Ch. 672.
5. (1894) 6 R. 167,
6. L. R. (1902) P. 130,
7. (1878) L. R. 4 Ex. D. 32.
8. (1879) L. R. 5 Ex. D. 137,

the parties without ordering a new trial. A long course of practice strictly limited the grounds on which a new trial could be granted and the procedure relating to motions for the purpose has varied from time to time (cf. per Fletcher Moulton, L. J. in *Dean* v. *Brown* [1] *Penn* v. *Bibby* [2] *In re May* [3] *Heckscher* v. *Crosley* [4] *Allcock* v. *Hall* [5]). Motions for a new trial are now regarded as pertaining to the appellate jurisdiction of the Court and governed to a certain extent by the principles relating to appeals (See O. 39 of the Supreme Court Rules), subject however to this important difference that where the appeal is from a Judge (without a jury) the Court of Appeal 're-hears' the case, even in so far as it involves questions of *fact*, see *Coghlan* v. *Cumberland* [6]. If after a case has been decided by the trial Court a party wants to avail himself of the benefit of *new* evidence, he may, in cases in which the question of fact is open for the decision of the Appellate Court, have it adduced in the Appeal (O. 58 r. 4) but in other cases, it will only afford him ground for a motion for new trial. In dealing with such motions, language of different degrees of strictness has been employed from time to time in the reported cases. In *Anderson* v. *Titmas* [7] it was said that a new trial would not be granted on the ground of the discovery of fresh evidence unless there is a reasonable probability that it would have altered the verdict. Cleasby, B. said that the fresh evidence should be conclusive. Twenty years later, in *Young* v. *Kershaw* [8] one learned Judge of the Court of Appeal (Smith, L. J.) required that the new evidence must be such as, if it had been adduced at the trial, 'would have been conclusive, so that the verdict must have been found otherwise.' Another Lord Justice (Williams, L. J.) said that the new evidence must be such 'that without it the verdict must be taken to have been based on mistake, surprise or fraud.' The third Lord Justice (Collins, L. J.) described the test with the qualification that the evidence must be 'practically conclusive', so as to render it 'probable almost beyond doubt' that if it be adduced, the verdict would be different. Then came *Brown* v. *Dean* [9] in which Lord Loreburn, L. C. laid it down that the new evidence 'must at least be such

1. L. R. (1909) 2 K. B. 573
2. (1866) L. R 2 Ch. App. 127.
3. (1885) L. R. 28 Ch. D. 516.
4. (1891) 1 Q. B. 224.
5. L. R. (1891) Q. B. 444.
6. L. R. (1898) 1 Ch. 704.
7. (1877) 36 L. T. 711.
8. (1899) 81 L. T. 531.
9. L. R. (1910) A. C. 373.

as is presumably to be believed and, if believed, would be conclusive.' But Lord Shaw, it may be noted, would not accept the test as thus stated; his Lordship only thought that the new evidence should be 'material' and 'relevant'. It is scarcely necessary to point out how considerable is the difference between the two standards. When that case was before the Court of Appeal Lord Alverstone, C. J. said that 'if the matter were *res integra* there would be a good deal to be said for giving a County Court Judge, at any rate in a case tried before himself alone, a wider discretion as to ordering a new trial than exists in the Supreme Court.' In *Warham* v. *Selfridge* [1] the point was stated substantially in the terms employed by Williams, L. J. in *Young* v. *Kershaw* [2] *viz.*, that the new evidence must be of such a character 'as to justify one in saying that the verdict could not in the interest of justice be relied on because it was based on mistake, surprise or fraud.'

Turning now to the former practice in Chancery the test suggested in *Bennet* v. *Lee* [3] was, whether the new evidence was 'relevant to the matters in question or so material as to induce the court to put the parties to the expense of a new hearing.' In *Thomas* v. *Rawlings* [4] the Master of the Rolls dealt with the application on the footing whether 'if the matter were brought before me on the former evidence in the cause, coupled with what is now adduced and with no other or further evidence, it would have induced me to make a different decree to that which I then pronounced.' *Hungate* v. *Gascoyne* [5] deserves to be particularly noticed The Vice-Chancellor had granted the plaintiff leave to file a bill of review on the ground that the new evidence was 'material to the issue,' but Cottenham, L. C. discharged that order holding that the question was 'not merely whether the evidence was material but whether looking at the case made on the other side and the whole mass of evidence adduced on the former hearing, what was now brought forward would have been likely to have altered the judgment which the Court then came to.' In *Hosking* v. *Terry* [6] the Judicial Committee described the new evidence required as of 'such a character that if it had been brought forward in the suit it might probably have

1. (1914) 30 T. L. R. 344.
2. (1899) 81 L. T. 531.
3. (1742) 2 Atk. 529.
4. (1864) 34 Beav. 50.
5. (1846) 2 Ph 25.
6 (1862) 15 Moo. P. C. 493.

altered the judgment.' And more recently, in *In re Appa Rao* [1] the Board described a 'relevant case of *res noviter*' as 'new matter which would, if it had been submitted to the consideration of this Board, possibly have led to a different decision from that which was formerly arrived at.' (See also, *Falcke* v. *Scottish Imp. Insurance Co.* [2] and Daniell's Chancery Practice. 7 Edn p. 1286.) To the same effect was the observation of the House of Lords in *Boswell* v. *Coaks* [3] where Lord Selborne, stating the principles applicable to the old bill of review, said that two things must be shown, 'first, that something has been newly discovered * * * * * and then, that that something is material.'

The decision in *Turnbull & Co.* v. *Duval* [4], referred to by Mookerjee, J. in the case under notice, gives us little guidance on the present question except for the general statement of Lord Lindley that a new trial ought not to be 'lightly granted.' In the particular case, their Lordships decided against the motion for new trial on the ground that the document whose discovery was relied on could have been had even before, if proper steps had been taken; but they went on also to express their opinion on the possible effect of the new document, observing that 'it might perhaps have been useful' at the trial for cross-examination but 'it ought not to alter the final result.'

Reference may conveniently be made here to certain observations of Vaughan Williams, L. J. in *Birch* v. *Birch* [5], where the question arose in connection with a petition to stay the hearing of a fresh action instituted to obtain a declaration that a prior judgment had been obtained by fraud. The House of Lords in *Boswell* v. *Coaks* [3], had intimated that such, an application should be dealt with in accordance with the principles applicable to the old bill of review. After stating that the new facts relied on in support of the fresh action should be such as to 'raise a reasonable probability of the action succeeding,' the learned Lord Justice proceeds to observe. 'But I do not think that it can be laid down as a hard and fast rule that the evidence ...must be of such a character that it would be evidence in the action itself........... .....Suppose the case of a judgment based on the validity of a document vouched by one witness alone : suppose

1. (1886) L. R. 11 A. C. 660 S. C I. L. R. 10 M. 73.
2. 57 L. T. 39.
3. (1894) 6 R. 167.
4. L. R. (1902) A C. 429.
5. L. R. (1902) P. 130.

that that witness had sent to the police authorities a confession that the document was forged by him; suppose that that witness had written to say that he desired to return from abroad to give himself up for trial for the offence of forgery; suppose that he had actually taken ship for the purpose of coming to England and surrendering for his trial * * * * * * none of the matters included in this hypothetical case could he used as evidence on the trial of the action. But I do not think that it would be possible to describe the action as frivolous or vexatious* * * * * * I should think that in such a case the action ought to go on * * * in each case it is a question of degree.'

It may be mentioned in passing that even in the Chancery (before the Judicature Acts) there was a procedure by way of motion for new trial, in cases where the Court of Chancery had sent up issues for trial (at law) by a Jury. It is worth noting that even in such cases, the rules in equity were 'less strigent' than at law. In the words of Lord Romilly in *Swinfen* v. *Swinfen* 1, the course in Courts of equity was 'not to consider merely whether there was evidence which would support the finding of the Jury, and in that case to refuse a new trial, but...... to consider whether, having regard to the entire subject-matter and to the whole of the evidence given at and before the trial and what has since become known, the Court is satisfied that full and complete justice has been done between the parties and that no further investigation is necessary for the purpose of attaining that end.'

In *Shields* v. *Boucher* 2 upon the trial of an issue directed by the Chancery, the evidence of a material witness had been discredited as being uncorroborated and in other respects also unsatisfactory. There was a motion for new trial before Knight-Bruce, V. C. and in support thereof certain affidavits were filed showing that the evidence of the witness might be substantially corroborated. The Vice-Chancellor in granting the motion put to himself the question 'Is it not possible, fairly possible, that confirmatory testimony * * * * * might rationally have had weight with the Jury, may well deserve consideration.' This is surely very different from saying that the new evidence must be conclusive or even practically conclusive. He also states that 'a learned

1. (1859) 27 Beav. 148. 2. (1846) 1 De. G. and Sm. 40.

Judge of the greatest experience in the courts of common law' was consulted by him as to 'whether, in his opinion, if an analogous question were to arise in one of those courts upon a motion or rule for a new trial in an action, a new trial would be granted on the affidavits' and the answer was in the affirmative While treating that opinion as deserving of his attention and consideration, the Vice-Chancellor adds 'neither that answer nor the general course or habit of dealing with such matters at common law binds me'.

A recent decision of the Court of Appeal in England (*Robinson* v. *Smith* [1]) illustrates the hardship, if not injustice, likely to result from a strict enforcemnt of the established Common Law rule as to the granting of new trials.

Out of the several ways in which, as above pointed out, the conditions requisite to warrant a re-hearing have been stated in England, it is difficult to see why Courts in India should be called upon to accept the most narrow and rigorous one laid down by Smith and Collins, L. JJ. in *Young* v. *Kershaw* [2], and by Lord Loreburn in *Brown* v. *Dean* [3]. The Statute Law governing us here only requires that the matter or evidence alleged to have been discovered should be 'new and important.' If anything the history of this provision, in Indian processual law, must lead us to the adoption of the more liberal rule that obtained in the chancery courts. Here, as there, the primary intention of granting a review was a re-consideration of the same subject by the same Judge except in special cases (*Maharajah Moheshur Sing* v. *The Bengal Government* [4]), and this has been expressly provided for in the Statute. The recognition, from the earliest days of British legislation in this country, of a power of review not merely on certain specified grounds but also 'for any other good and sufficient reason' (Bengal Regulation XXVI of 1814. S. 4) shows that the Jurisdiction was meant to be wider than that recognised in England in recent times (See *Amir Hasan* v. *Ahmad Ali* [5]) and approximates the aim and scope of this Jurisdiction to those of the power exercised in this behalf by the Lord Chancellor in England. And from the early days, the condition requisite in this country for the grant of a review was that the court should be satisfied that the review desired 'was necessary to correct an evident error or omission or was otherwise

1. L. R. (1915) 1 K. B. 711.
2. (1899) 81 L. T. 581.
3. L. R. (1910) A. C. 373.
4. (1859) 7 M. I. A. at p. 304.
5. (1886) I. L. R. 9 A. 36.

requisite for the ends of Justice.' In the case of inferior courts, the former practice here was that they could grant a review only with the permission of the appellate court, but since 1859, even this limitation has been abrogated and Act VIII of 1859 went the length of giving *finality* to their orders in the matter of granting or refusing a review. Where the review was applied for on the ground of the discovery of new evidence, the Regulations did not prescribe anything as to the *nature* of the new evidence nor even the Code of 1859. In one case (*Shumsheir* v. *Ramchandur* [1]), one of the Judges (Steer, J.) took occasion to define what he conceived to be the principles that should guide Judicial officers in exercising 'the very large discretion with which the law is thought to invest them' in the matter of granting reviews. In the course of his observations on the point, the learned Judge said 'If...the Judge finds that the new evidence tendered is not sufficient *per se* to show that the decision of the predecessor is wrong on the matter of fact, or that the new evidence, if thrown into the scale, would not create an overpowering balance of evidence' on the side of the applicant 'the Judge's proper course is to refuse the application' Nine years later (in *Sahabjan Bibee* v. *Sufdur Ali* [2]) Sir Richard Couch and Mr. Justice Ainslie expressly dissented from these remarks and pointed out that the law authorises the new evidence to be admitted if once the court is satisfied that it had not come to the knowledge of the parties before. When it is admitted, 'the Court is to consider the case with the new evidence in the same way as the case would have to be considered before. There is no more reason for an overpowering balance of evidence when the judgment in review comes to be given than there was on the first occasion' Next year (in *Heera Lall* v. *Ram Taruck* [3]) Mr. Justice Macpherson, dealing with a very belated application for review, remarked that 'the circumstances must be special * * * * and the evidence discovered must be of a clear and conclusive character'. The appplication was dismissed after a consideration of the probable effect of the new evidence and also on the ground of various suspicions attaching to the document relied on. It is not certain whether the learned Judge meant the above statement to be a general rule. In this state of things, the Indian Legislature, when enacting the Code of 1877 contented itself with qualifying the 'new matter or

1. (1865) 2 W. R. 174. 2. (1874) 22 W. R. 288.
3. (1875) 23 W. R. 323.

evidence' by the epithet 'important' and that is the form in which the rule has remained to this day. Why should the Courts go and add to it or import restrictions which the Legislature has not thought fit to enact? In the words of Fletcher Moulton, L. J, in his dissenting judgment in *Dean* v. *Brown* [1] 'the practice of the English Court, in this matter, does not represent principles of abstract justice which are equally binding on all tribunals' nor does it rest on 'the interpretation of a statutory jurisdiction given in like language.' Where the power is conferred and defined by statute, its 'scope and restrictions must be ascertained from the language of the section itself.'

The decision of the Privy Council in *Kessowji Issur* v. *G. I. P. Railway Co.* [2] has very little bearing upon the point under discussion. The question there turned on the power of an appellate court to admit fresh evidence *in appeal.* There had no doubt been an application for review in that case before the court of First Instance (Tyabji, J) which had been refused and in that connection their Lordships lay stress on the condition laid down in the code that the applicant for review should strictly prove the absence of negligence on his part. The Judicial Committee also draw attention to the difference between the admission of 'further evidence' *on appeal* and the letting in of newly discovered evidence in a proceeding by way of review, but no point arose there as to the *nature* of the evidence to be tendered in support of a review application.

Proceeding next to the question of the power of an appellate court to discharge an order of a subordinate Court granting a review on the ground of the discovery of new evidence, the practice in India under the early Regulations was, as already stated, for the subordinate Court to grant a review only on report to and the permission of the superior court. The Circular orders of the Sudder Court required that the judge should in the letter asking for permission state distinctly the grounds of his opinion and where there was a plea of new matter or evidence discovered, 'the manner in which the new matter was discovered and the cause of the inability of the party to produce the evidence in proper time, with the proof of the fact, should be clearly detailed as well as the effect which the new matter or evidence would have in impeaching the propriety of the

1. L. R. (1909) 2 K. B. 573. 2. (1907) I. L. R. 31 B. 381.

judgment' (Macpherson's Procedure 1854 p. 540. citing Cir. Order, Cal. and West Cir. 27 Novr. 1835). In a case governed in some measure by these Regulations the Judicial Committee, on an appeal from the final decision passed on review, examined the sufficiency of the reason assigned for granting the review and holding against it set aside the order 'as granted without due regard to the Regulations' with the result that the original decision was restored without any examination of the merits. (*Moheshur Singh* v. *The Bengal Government.* [1]). When in 1859, subordinate courts were empowered to grant reviews on their own authority, without reference to the superior court, the Act went on to declare that the 'order, in either case, whether for rejecting the application or granting the review, shall be final.' And where the plea was one of *res noviter*, the Code made no specific provision as to proof of absence of negligence at the time of the trial. It accordingly became necessary (as many a reported decision in the Weekly Reporter Volumes would show) for the High Court to insist on such proof as being within the intendment of the law, and the Calcutta High Court held that though in consequence of the 'finality' given by the Act to the order of the subordinate court, the re-hearing could not be prevented by the Appellate Court, yet on an appeal against the decree passed at such re-hearing, the appellate court could restore the original decree if it thought that the review had been granted on insufficient grounds (See *Shumsheir* v. *Ram Chunder* [2]), or on an application made after the prescribed time without sufficient cause for the delay (*Gunga Narain Roy* v. *Gonomoonee* [3] approved by the Judicial Committee in *Lachman Singh* v. *Tirbani Buksh* [4]), or on a plea of new evidence without proof that such evidence could not have been adduced at the former trial. *Bhyrub Chunder* v. *Madhub Ram* [5]. Steer, J. in *Shumsheir* v. *Ram Chunder* [2] already cited, added "If there is no power, by way of appeal, to check the lower Courts from improperly granting applications for review and upsetting the decisions of their predecessors, then most assuredly the law should be altered to provide against such an arbitrary power." The Madras High Court in *Gurumurti* v. *Pappa Nayudu* [6] held that when a subordinate Court has

1. (1859) 7 M. I. A. 283.
2. (1865) 2 W. R. 174.
3. (1867) 8 W. R. 184.
4. (1874) 14 Beng. L. R. 373.
5. (1873) 20 W. R. 84 (F. B.)
6. (1863) 1 M. H. C. R. 164.

thought it right to grant a review, it 'cannot be objected upon appeal that the reasons for granting the review were improper or insufficient'. In *Sahebjan Bibee v. Sufdur Ali* [1] it was held that where a lower court, with materials before it, had come to the conclusion that the review applied for must be granted in the ends of justice, it was not for the appellate court to interfere with it though it 'might not agree in the view' taken by the lower court. The North West Provinces High Court, as early as 1872, restricted the finality to the 'grounds on which a review is held to be necessary' and claimed for the appellate court the power to decide 'whether just or reasonable cause has been shown for the admission *after time* of an application for review'. *George* v. *Hamilton* [2]. It may be pointed out that the decision of this question involves the exercise of *discretion* by the lower court and it will not therefore be right to say that on a question of 'discretion' the appellate court has no *power* to interfere. In *Reasut Hossein* v. *Hadjc Abdollah* [3] the Privy Council had to deal with an order of the High Court (in its extra-ordinary jurisdiction) setting aside a subordinate court's order granting a review. Their Lordships in reversing the High Court's order pointed out, "Upon an appeal, where an appeal lies, it may be open to the Court of appeal to say that the judge ought not to have admitted a review; but that is a very different thing from ruling that he has acted wholly without jurisdiction. In the first case the appellate Court reverses the order because the judge has erred in the mode in which he has exercised a judicial discretion; in the latter case, it quashes the order because there was no discretion at all to be exercised.'

It was in this state of judicial authority that an express provision was inserted in Act X of 1877 declaring that an order granting a review may be objected to on certain specified grounds and that the objection may be made either at once 'by an appeal against the order' or later on, in any appeal against the final decree. The clause as drafted by the Select Committee provided that the order 'shall be final except where the review has been granted without jurisdiction, in which case an appeal shall lie' and it is only at the last moment that it assumed its present form. It was also in terms enacted that an

1. (1874) 22 W. R. 288. 2. (1872) 4 N. W. P. 74 (a).
3. (1876) I. L. R. 12 C. 13.

application on the ground of the discovery of new matter or evidence shall not be granted "without strict proof" that such matter or evidence was not within the applicant's knowledge or could not adduced by him when the decree was passed. It may be reasonably assumed that these provisions were framed in view of the pre-existing case law (above referred to.) According to the principle recognised by the Judicial Committee in the case last cited the appellate court should, with reference to the specified grounds, have the power to say that the Judge in the Court below 'had erred in the mode in which he has exercised his judicial discretion.' In connection with the grounds of objection recognised, the question of discretion may be said to arise with reference to (1) the proof of the circumstances of the discovery of the new evidence and (ii) the proof of sufficient cause for the delay, when the application is presented after the time prescribed (this provision has been embodied in S. 5 of the Limitation Act). The rules ordinarily regulating the interference by the appellate court in matters left to the discretion of the Court below are fairly well settled and we venture to doubt whether even according to them the powers of the appellate Court are quite so limited as stated by Mukerjee, J. in the case under notice. But it seems to us that in the present matter a different principle was intended to be adopted by the Legislature when it insisted on 'strict proof' as to the circumstances of the discovery and gave a specific right of appeal on the ground of contravention of that rule. The right of appeal appears to us, with all respect, to become almost shadowy if the appellate Court, as though it were dealing with the verdict of a jury or with a finding of fact (in second appeal), has only to see 'whether there was *legal evidence*' to support the view of the Court below and not consider the 'sufficiency' of the proof. The restrictive interpretation is based by Mukherjee, J. on the decision of Sir Lawrence Jenkins, C. J., and Woodroffe, J. in *Ahid Khondkar* v. *Mohendra Lal De* [1], where they held that 'strict proof' merely meant 'proof according to the formalities of the law' and had 'no reference to the sufficiency or the quantum of evidence.' Those learned Judges take the use of the word 'strict' as indicating that it was the 'form' of proof (and not its 'probative value') that was meant to be prescribed. With all respect, it seems to us that this

1. (1915) I. L. R. 42 C. 880.

will prove too much; for on that construction even the Court granting the review (and not merely the Appellate Court) will only have to see to the 'form' of the proof and not to its 'sufficiency,' the expression 'strict proof' being used in describing what the court has to insist on before granting a review. On the other hand it would be alike appropriate and more consistent with the reason of the thing, to understand those words as prescribing the 'standard' of proof required and removing the question out of the ordinary category of 'discretionary' matters. So far as we can trace, the expression 'strict proof' seems to have been employed in this connection by Sir Barnes Peacock in *Dwarkanath* v. *Kishenlall* [1], where after pointing out that the petition for review in that case did not even allege in terms that the new documents relied on were not formely known to the petitioner, the Chief Justice went on to add, "Even if the fact had been stated, I should not have granted the application without strict proof that the new matter was discovered since the decree was passed." There is nothing in the context to suggest that the words were meant to refer to the 'form' of proof rather than to its probative value. Some observations in *Nundar Chand Bhooya* v. *Reedoy Mundal* [2], may seem to lend colour to the theory of formal proof; for there the court laid down the rule that in granting a review in such a case, the Judge 'must first satisfy himself on legal evidence that the applicant has brought himself within the section, in other words, must insist on the fact of the applicant's ignorance or inability being strictly proved.' But this we think can not be the proper interpretation of those remarks in view of the decision in *Nuffurchund* v. *A. D. Sandes* [3], which the case purports to follow. In the earlier Case, the learned judges first state that if there had been 'any evidence to this effect before the judge, we could not, here sitting in special appeal, have interfered with his discretion'— there was then no provision in the Code giving a right of appeal against the order granting the review. They then proceed to say, "Even had there been some evidence before the judge upon which he could have legally come to the conclusion favourable to the petitioner still, * * * * to use the words of the Chief Justice reported in Marshall 554, he ought not to have granted the application without strict proof that the new matter was discovered since the

1. (1868) Marshall p. 553. 2. (1872) 17 W. R, 458.
3. (1868) 10 W. R. 132.

decree was passed.' This makes it clear that the learned judges understood Sir Barnes Peacock's expression to refer to the 'standard' of proof and not to its mere form and this also seems to be the spirit of the observations of the Judicial Committee in *Kessowji* v. *G. I. P. Ry. Co.* [1] where, referring to this provision of the Code, their Lordships say it exacts very strict conditions so as to prevent litigants lying on their oars when they ought to be looking for evidence.

SUMMARY OF ENGLISH CASES.

Rondeau Le. Grand and Company *v.* **Marks.** 1918 1 K. B. 75 (C. A.)

Husband and wife—Agreement that all wearing apparel provided by the husband to the wife should belong to the husband subject to the right of the wife to wear during his pleasure—Validity of—Right of Judgment creditor of the wife against the wearing apparel.

When a husband and wife entered into an arrangement by which all dresses and wearing apparel were to be purchased by the husband in his name and on his credit and that he was entitled to dispose of them as and when he pleased and the wife was only entitled to wear them during his pleasure such an agreement is not contrary to public policy or void for want of consideration and it is a valid agreement. A judgment-creditor of the wife is not entitled to proceed against such wearing apparel for the satisfaction of his judgment.

The Common Law obligation of the husband to provide clothes to his wife is discharged by his giving or lending the clothes to her. The presumption that he intends to give them to her may be rebutted by such an agreement as mentioned above.

Clements *v.* **The County of Devon Insurance Committee :** 1918 1 K. B. 94 C. A.

Arbitration—Agreement of, between panel Doctor and Insurance Committee—Questions arising under agreement—Reference to Insurance Commissioners—Submission to Arbitration—Stay of action—National Health Insurance Regulations 1913, Reg. 51—Arbitration Act, 1889, Ss. 4 and 27.

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1. (1907) I. L. R. 31 B. 381.

Where a medical practitioner on the panel and the Insurance Committee of a county entered into an agreement by which any dispute or question arising between the Doctor and the committee relating to the construction of the agreement and the rights and liabilities of either should be referred to the commissioners and the commissioners if they so thought fit were empowered to authorise two or more of the commissioners to hear and determine such question, and a dispute arose under the agreement and the practitioner brought an action against the committee in respect thereof and the committee applied for stay of the action under S. 4 of the Arbitration Act, *held,* (Bankes, L. J. doubting) that there was a " submission" to arbitration within S. 27 of the Arbitration Act and the court has power to stay the action in its discretion.

Johnson *v*. Sargant and Sons, 1918 1 K. B. 101.

Statutory order—Date when it comes into operation—Order of the food controller under the Defence of the Realm Regulations.

While a statute takes effect on the earliest moment of the day on which it is passed or on which it is declared to come into operation, an order passed under statute does not come into operation before it is known.

An order by the food controller inder the Defence of the Realm Regulations was dated the 16th of May 1917 but was not known to the parties or the public till the 17th of May, *held* that the order came into force only on the 17th when it was known.

Gonsky *v*. Durrell, 1918 1 K. B. 104.

Distress—Seizure of privileged goods—Value of other privileged goods after distraint—County Courts Acts, 1888 S. 147—Burden of proof—Common Law protection.

S. 147 of the County Courts Act provides "every bailiff or officer executing any process of execution issuing out of the court against the goods and chattels of any person may by virtue thereof seize and take any of the goods and chattels of such person (excepting the wearing apparel and bedding of such person or his family and the tools and implements of his trade to the value of £5 which shall to that extent be protected from such seizure.")

The plaintiff who sues the defendant for damages for wrongful distress under the above section and S. 4 of the Law of Distress Amendment Act must show that the value of the wearing apparel bedding and the implements of trade left upon the premises after the distress was less than £5 in value.

In an action framed solely upon the statute it is not open to the plaintiff to set up that the distress was bad at Common Law. In an action at Common Law the burden of proving the value of the goods left would be upon the defendant.

Clake Bros. *v.* **Knowles** (1918) 1 K. B. 128.

Jurisdiction—County Court—Action brought in a District where no part of the cause of action arose—Absence of jurisdiction —Step taken by defendant—Waiver—Prohibition—Contract by correspondence—Whether part of the cause of action arises where the letter of offer is posted.

Where a contract is effected by correspondence the posting of the offer does not constitute part of the cause of action. On the other hand the making of an offer is part of the cause of action and an offer is made where it is received.

A demand by the defendant for particulars of the claim in order to enable him to ascertain in order whether any part of the cause of action arose within the District in which the action is brought and the giving of an address for service do not amount to a waiver of the defect of local jurisdiction of the County Court over the cause of action.

Per Lush, J., The objection that no part of the cause of action arose in the District in which the action is brought is one of procedure rather than of jurisdiction. The case is not one of total absence of jurisdiction.

Trebeck v. **Croudace** : (1918) 1 K. B. 158 (C. A.).

False imprisonment—Arrest without warrant—Suspicion—Common Law and statute—Charge of being drunk while in charge on highway, of taxicab—Honest and reasonable belief in charge —Mistake—Licensing Act, 1872 (35 and 36 Vic. C. 94) S. 12.

Not only has a constable no power at Common Law of arresting a person without warrant on suspicion of having committed a misdemeanour, but he has no power of arresting without warrant in any case of misdemeanour except when a breach of the peace had been committed in his presence or when there was reasonable

ground for supposing that a breach of the peace was about to be committed or renewed in his presence. In aid of the Common Law on this point and to supplement the powers of constables and others, the legislature has from time to time given authority for arrest without warrant in a number of cases of misdemeanour S. 12 of the Licensing Act, 1872 provides that every person who is drunk while in charge on any highway of any carriage may be apprehended and shall be liable to a penalty. Acting under the powers conferred by this section, the defendant a sergeant of police, took the plaintiff, a taxi-cab driver, into custody on a charge under the section. The plaintiff denied that he was drunk, and the Magistrate acquitted him. Thereupon the plaintiff brought an action claiming damages for false imprisonment. It was found as a fact that the defendant honestly believed at the time he arrested the plaintiff that the plaintiff was drunk. *Held* that the defendant was not liable in damages.

Rex *v.* Wakefield : (1918) 1 K. B. 162.

Criminal trial—Trial by Jury—Personation of juryman venire de novo.

Where after a trial and conviction in a criminal case, it was discovered that one of the jurors summoned to serve on the jury which tried the accused was personated by his bailiff who served on the jury though not qualified to do so : *Held* that there had been a mistrial and that a *venire de novo* should be granted.

Upjohn *v.* Hitchens. (1918) I. K. B. 171.

Landlord and tenant-covenant to insure against loss or damage by fire—Policy to be effected in specified companies—Practice of companies to except war risks in policy—Aircraft risks—Admissibility of evidence—Covenant—Construction.

By a lease of the year 1905 the lessor covenanted that he would insure the demised premises against loss or damage by fire in one of certain specified companies selected with the previous approval of the lessor. The premises were duly insured with a named company under a policy which excepted loss or damage arising from "invasion, foreign enemy, military power, etc." Till July 1915 the lessor had accepted the policy as sufficient, when in consequence of air raids by the enemy, he required the lessee to

insure the premises against loss or damage by fire occasioned by enemy aircraft, in pursuance of his covenant. On the failure of the lessee to remedy this alleged breach of covenant, the lessor sued to eject him *Held*, that the covenant was to effect such a policy as was the usual policy of the specified companies at the date of the lease or as might be usual from time to time during the pendency of the lease and that as it was clear on the evidence that the named companies had never insured against aircraft risks, (which were in fact specially excepted by their policies) there was no breach of covenant by the lessee.

Goldrei Foucard and Son v. Sinclair and Russian Chamber of Commerce: (1918) 1 K. B. 180 (C. A.)

Judgment—Merger of cause of action—Contract—Claim for damages for fraudulent misrepresentation against company and its agent—Alternative claim for rescission against company—Alternative claims—Judgment on one, not a bar to trial of the other.

A person who has been induced by misrepresentation to take shares in a company has two remedies open to him. He may bring an action against the company only for rescission of the contract and return of the money paid or he may bring an action in tort for fraudulent representations against both the company and its agent where the two have joined to commit the fraud. He may also take both these courses if he wish. In the former case, that is, an action for rescission and return of the money paid, the plaintiff need not prove fraud, but will succeed if he establish an innocent misrepresentation. He can in such an action obtain no relief against the agent of the company. If he do prove fraud in an action for rescission and return of the money he is in no better position than if he had proved innocent misrepresentation. In an action for damages arising from misrepresentation made jointly by the company and its agent he cannot succeed unless he prove that the misrepresentations were made fraudulently, and the measure of damages in such an action is not necessarily the amount of the money paid to the company. The two forms of action are founded on different causes of action and judgment entered in one is no bar to the trial of the other.

Marconi's Wireless Telegraph Company *v.* **Rex.** (1918) 1 K. B. 193 (C. A.)

Petition of right—Trial—Right to jury—Discretion of Judge—Question of construction of documents—Damages for breach of contract—Petitions of Right Act, 1860 (23 and 24 Vic. C. 34) *S.* 7.

In the case of a Petition of Right presented under the provisions of the Petitions of Right Act, 1860, the court has a discretion under S. 7 of the Act to order the petition to be tried without a jury, though in an action of the kind between subject and subject, either party would have been entitled to a jury.

Having regard to the fact that the case which related to a claim for damages for breach of contract, was a complicated one turning mostly on the correspondence the discretion of the judge was held to have been rightly exercised.

Wellaway *v.* **Courtier** (1918) 1 K. B. 200.

Trespass—Action for—Right to possession of crops on the land, if enough to support the action.

Plaintiff purchased a crop of growing turnips on a plot of land and one of the conditions of the sale was that the plaintiff should not remove more than half of them, the other half having to be consumed on the spot. The defendant was the purchaser of a crop of grass on land adjoining plaintiff's plot and defendant's sheep trespassed on plaintiff's plot and caused damage. In a suit for damages for trespass, *held* that the plaintiff had such an exclusive right to the possession of the turnip crop as to entitle him to bring trespass, notwithstanding that his right to dispose of the turnip crop when severed, was limited.

Edgelow *v.* **MacElwee** (1918) 1 K. B. 205.

Moneylender—Who is—Solicitor lending money—Money Lenders Act, 1900 (63 and 64 Vic. C. 51.

A man does not become a money-lender by reason of occasional loans to relations, friends or acquaintances whether interest be charged or not. Nor does a man become a money lender merely because he may upon one or several isolated occasions lend money to a stranger. There must be more than occasional and disconnected loans. There must be a business of

money lending. The word business imports the notion of system, repetition and continuity. Each case must depend on its own peculiar features. It is ever a question of degree.

A solicitor who while proposing to carry on this business as such, makes a practice of advancing money to clients and others, has to register himself under the Money Lender's Act, 1900, unless his primary object in lending the money is to maintain or increase his professional business and earn professional fees.

Belfast Ropework Co. *v.* Bushell: (1918) 1 K. B. 210.

Carrier—Common carrier and private carrier—Difference between option to refuse employment—Haulage contractor, if liable as insurer, for goods delivered for carriage.

To make a man a common carrier he must carry as a public employment; he must carry for all indifferently; he must hold himself as ready to carry for hire as a business and not as a casual occupation *pro hac vice.* All other carriers by land are private carriers. If a person, while inviting all and sundry to employ him, reserved to himself the right of accepting or rejecting their offers of goods for carriage whether his lorries were full or empty, being guided in his decision by the attractiveness or otherwise of the particular offer and not by his ability or inability to carry having regard to his other engagements, he is not a common carrier and is not liable for the loss of goods by fire during transit, without his own negligence.

Gascoigne *v.* Gascoigne : (1918) 1 K. B. 223.

Fraud of Creditors—Trust—Purchase of property by husband in wife's name—Intention to defeat Creditors—Subsequent dealings in wife's name—Presumption of gift.

In an action by a husband against his wife for a declaration that she was trustee for him of certain leasehold property it appeared that the plaintiff while living with the defendant took the lease of the lands in her name and built upon it with his own money and that he used his wife's name in the transaction with her knowledge and connivance because he was in debt and was desirous of protecting the property from his creditors. *Held,* that the husband could not set up his fraudulent design to rebut the presumption that the conveyance was intended as a gift to his wife and she was entitled to retain the property for her own use though she was a party to the fraud.

JOTTINGS AND CUTTINGS.

A Ready Retort :—Sir Albert Bosanqnet had a power which is characteristic of the really humorous speaker. He possessed and was able to maintain a funeral solemnity when saying the drollest things. This solemnity was in part due to his professional avocations Immersed as he was in black letter law, he seldom had a case which could be furthered by any excercise of his ready wit. Indeed his style of advocacy once excited the criticism of the late Sir Frank Lockwood. Mr. Justice Gainsford Bruce was a contemporary of Sir Albert. He, too, when at the bar, was regarded as a very dreary although very able exponent of the law. One day Sir Frank Lockwood said to Mr. Bosanquet, Q. C., " Really, Bozy, I think you are the very dullest man at the Bar!" To which the historic reply : " Have you considered the case against Gainsford Bruce"? But to hear Sir Albert after dinner was and I believe still is to rock your sides with laughter.—*The Canada Law Journal.*

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The following are some extracts from Mr. Balfour Browne's " Forty Years at the Bar " which may interest our readers.

Speaking of *Lord Llandaff* (*Henry Mathews, Q. C.*) *he says*: " Lord Llandaff was distinctly a man who was very much alive and who naturally demanded admiring attention. He was a man of very great ability, but I have seen many men with such less who made better advocates. Indeed, brilliance in a man is not the best ware to take to the market of a common jury. I feel inclined to offer Kingsley's advice to his daughter, slightly altered, to an aspiring barrister, " Be plain, good sir, and let who will be clever."

" Henry Mathews was too clever by half for an ordinary tribunal. A jury or even a stupid judge—and there are some—is suspicious of the qualities of genius in an advocate, and thinks with the common people that a man with such ability is taking them in; for the common people's idea of a lawyer is that he is intending to deceive and that there is more than meets the eye in the transposition of the letters in the word "lawyers" which in a different order make " slyware" ; and it is reported of a learned judge, so much is Bar eloquence a thing of the past, that he said of a clever counsel, " Sir, he insulted me with a peroration."

As a verdict-getter—and that is the real test for the client—Mathews was not very successful. To persuade a man you

must not seem to stoop to his intelligence. It was in this way that great, heavy, clumsy, slow Jack Holker (afterwards Lord Justice Holker) came to be a really successful man. He had the art of never seeming much cleverer than the people he was addressing. Besides, patience is an excellent quality in a counsel, and Henry Mathews was an impatient man. In the long inquiry I have mentioned he lost his little bit of temper several times, but notably with an engineer of experience, and turning to another Member of the Commission, I think, it was Mr. John Mellor, Q. C., he said in a voice which all the counsel and also the poor brow-beaten witness heard, "A damned obstinate witness."

But there is an authentic story of him while he was at the Bar. He had a well-disposed but interrupting junior with him in a case. No doubt such a junior, like the miner's wife in George Eliot's Felix Holt, of whom her husband said, "Lord a-massy! she thinks she knows better nor me," is an annoyance, but his punishment at the hands of Henry Mathews was perhaps unnecessarily severe

"Sir," he said, when his argument was over, to his learned friend in the back row, "you have kept me in purgatory. What with you behind and that man in front" (that was the learned judge) "I have led the life of the damned."

Once down on circuit he had as a junior a very careful man who is now a distinguished judge. They met in consultation and Henry Mathews said,

"There is only one point in this case..." and he expressed his view.

The junior with becoming diffidence suggested that there was another point. But his leader shook his head peremptorily and said, "No."

"Forgive me," said the client, who had just come into the room, "there is that point in the case."

"Is there?" said Mathews, and he took up the brief and flung it with its great white fluttering wings over the head of the client, and it fell rustling against the wall. "Well, find it," said the irritated leader.

Perhaps it was that quality which deprived him of the success his ability should have had at the Home Office and led to his being called the "Not-at-home Secretary."

Thus of *Richard Webster*: Sir Richard Webster (Lord Alverstone) has given his own recollections to the world and made it superfluous my recollecting him. Still I cannot forget him, and my memories of him, are all respectful. He was a man of great assiduity and plausibility, but—may I be forgiven for saying it—not a great man, although he attained great eminence in his profession and sat in the seats of the mighty on the Bench. He worked like a nigger and larded like a cook. He made a point of addressing almost everyone, even casual friends, by their Christian names, but I have no doubt it was all done with the intention of being kind.

I was with him in many cases, although he had left the Parliamentary Bar before I went to it. We were together for the greater part of a winter before Lord Bramwell's Commission as to the silting-up of the Thames at Erith. I acted as his junior in several important arbitrations. I found a note from him not long ago which was written at the Courts and sent to me at Westminster, in which he said,

"Dear Balfour, keep it up. I am just finishing Belt & Laws."

"Yours,

"R. E. WEBSTER."

Well I daresay I did keep it up, but not like Westbury Chancery junior. Once Bethel had to leave a Chancery Court to go down to the House of Lords, and told his junior to keep it up. The great man when he got down to Westminster forgot all about the case in Lincoln's Inn Old Hall. Indeed he did not go back into that Court for three days, but when he did go back he found his faithful junior still " keeping it up."

Webster had a large practice before the Railway Commissioners and in most of the cases I was leader on the other side. He had a big head with a cupola of a forehead and flabby face-muscles (his leg muscles were not flabby, as his feats at Cambridge showed), which hung in dewlaps under his eyes. He had luck and used it to the best advantage. I think on the whole he had a flabby mind, but he was an excellent man and a good fellow.

I remember a case I had at Quarter Sessions at Taunton as to the rating of machinery in some bobbinet manufacturies at Chard. The question was whether certain machinery

which was not fixed to the freehold, but was in the factories for the purpose of making them what they were, and was intended to remain there so long as it was a bobbinet factory, were to be taken into account as enhancing the value of the hereditament for rating purposes.

We succeeded in the Court of Quarter Sessions, but the Magistrate stated a case for the opinion of a superior court. I do not remember what took place in the King's Bench or the Court of Appeal, but in the House of Lords my clients very properly took in Sir Richard Webster to lead me. I was unable to be present at consultation. But I heard that Webster said, " Where is Balfour Browne to support his rotten case " Not a thing like that remains in one's memory when more important matters runs through its limp fingers. The case came on in the Lords and again owing to my having a case before the Railway Commissioners I was not there the first thing; but when I could get away I got into a hansom and went down to Westminster.

As I arrived at the door which leads into St. Stephen's Hall, Webster was getting into a hansom.

"What happened ? " I asked.

"We weren't called upon, " he answered, and drove away, but not before, I had time to say,

"So much for my rotten case, "

And he drove away with that fly buzzing in his ear.

He was an indefatigable worker with a quick, bubbling intelligence. He was a genial man—too genial to all perhaps to impress any one with his real genuineness. He called more acquaintances by their Christian names, which discounted a similar courtesy in the case of old friends. But although he was hard-working, not very deep man, he was wonderfully successful with a profession--the solicitor's--which does not " throw the lead," and so find the " fathoms " of their counsel. Indeed, deep men at the Bar are not merely so successful as the ripples. We can see the latter, we cannot plumb the depths of the former. The time for the criticism of the others has not yet come. They are still " in for" the Examination of Life, and the " marks " are not yet determined.

These are his reminiscences of *Lord Davey*:

Horace Davey (Lord Davey) was a wizened little man whose eyes seemed only two of his wrinkles, he "peeped through his eyes" but he was a man with the quickness of a fencer and the penetration of a rapier. He had a superior sort of sniff. He was a man who found the door into the House of Commons the narrow gate. He was not destined to popularity, and even at an election meeting was called by some dissentient "a slimy toad." But he really was too good a man for a rough-and-tumble platform and proved it by his want of success at Dundee, Christchurch, and elsewhere. I only had Sir Horace Davey as my super-leader three times.

In another case I was with him under somewhat curious circumstances. The British Gas Light Company supplied gas in Hanley, and certain gas consumers in the town had applied to the Recorder to reduce the price of gas so supplied. The British Gas Light Company was somewhat peculiar in its constitution. It is a limited company that carried on gas undertakings in various places, and these undertakings are conducted under separate Acts of Parliament. There were therefore some complicated legal points in the case, and the Company had taken the written opinion of Sir Horace Davey before the hearing of the case before the Recorder of Hanley began, and acted upon that opinion in resisting the reduction in the price of gas. The Recorder, I think to suit the convenience of counsel, and for that I am grateful, sat to hear the case in London, and the matter was before him for nearly a fortnight. I acted for the Compiny and told him with all the emphasis of which I was capable—and I daresay some of my learned friends would have called my emphasis by a harsher name—that he could not under the circumstances make an order to reduce the price of gas. But he did order the Company to charge sixpence less for every thousand cubic feet of gas sold. I advised my clients to go for a writ of *certiorari* to quash the order and they asked me if I would take the brief in the High Court. The case was coming on in the Law Courts when all the Committees at Westminster were in what was called "full swing" and I explained that it would be impossible for me to argue the case in Court, and advised my clients, as they had consulted Sir Horace Davey, to give him the brief. This was done, and our clients gave me a brief too, although I told them I would not be there; but they asked me to attend the consultation with Sir

Horace, as I had been in the matter all through. I went up to his room in the Law Courts one morning early and we were admitted to consultation. Sir Horace blinked at us, and in a few minutes indicated that in his superior opinion we were all wrong and could not succeed. When he had fully committed himself to that view I said,

"I fear, Sir Horace, that you have forgotten that you advised this Company, and," I added, "we have been acting throughout upon your opinion."

He blinked again, but this time at our client. "Have you got my opinion ?" he asked.

The client said he had not the opinion with him, but he endorsed what he had asserted, that we had been acting all through the proceedings in accordance with his advice.

Sir Horace put his pooh-poohs in his pocket and said, "This case can't come on to-day. We will have another consultation to-morrow morning, and would you bring my opinion with you ?"

We met again the next morning and Sir Horace was exceedingly bland. He said to me,

"I am very sorry, Balfour Browne, that I have a case this morning in the Privy Council which I must attend to. Can you look after this until one o'clock ? I will be up by then."

I was not pleased, I explained to him that this was our busiest time at Westminster and that I had asked the clients to brief him because I could not be absent from the Lobbies.

Then with some apologetic matter he asked me as a favour to him to remain until one o'clock. "The case", he said, "won't be on till the afternoon, and I will relieve you at lunch-time."

I promised, perhaps not with a very good grace, to do that, and he went away to Downing Street and I went into Court. The case, contrary to his prophecy, came on very soon. It was all over before one o'clock; the decision was in our favour and the Recorder's order was set aside.

I was with him in another case. An exceedingly pleasant and able member of our Bar, Mr. Meysey-Thompson, who died young, was the junior, and was responsible for having advised the action. I do not remember whether he was right or wrong, but I remember the scathing contempt with which Sir Horace jumped on us. The consultation was nothing but a defence of Meysey-Thompson, but whether he was acquitted or not after that bad half-hour I am unable to say.

But that case, recalls, not pleasantly, a somewhat ungenerous trick of some of the super-leaders. It has been alleged of certain doctors that they have made a long face and a black prognosis in all the cases they are called into, with a view to a reputation for medical prescience if the worst comes to the worst, or a reputation for extraordinary skill if the patient by reason of his own constitution pulls through. I cannot think that it is the same clandestine policy which actuates the leaders referred to, but some have had the way of taking the gloomiest view of their client's case and of blighting with curt words the timid arguments of any Mr. Phunkey who may be their junior.

CONTEMPORARY LEGAL LITERATURE.

In the "*Harvard Law Review*" for January, Mr. Nathan Isaacs elaborates the view that the several schools of jurisprudence, philosophical, analytical, historical, comparative, sociological do not represent different avenues of approach to a common goal but rather common goals. Different schools will appeal differently to different countries at different stages of legal development. One school will appeal to a country with a Code, quite another to one that has yet to frame a code, and so forth. It is not merely a question of appealing ; even as a matter of suitability, one school is more suitable to one nation at a particular stage than another. The German jurisprudence, the forms and methods of which are largely due to the existence of the German Code, is wholly unsuitable to the American people. Jurisprudence has as much a continuing history according to the writer as law.

In the "*Law Quarterly Review*" (January) Professor Holdsworth discusses the early history of Banking. The *campsores* or money changers were the earliest bankers. The Italian money-changers gradually replaced the Jews as the financiers of Europe. The English kings were large borrowers from various Italian houses and Edward III by his refusal to repay the money which he had thus borrowed, ruined the Peruzzi and the Bardi of Florence. This development had taken place in Venice and other commercial cities of Italy by the first half of the fourteenth century. The money changers were first used only for transmission of money but soon money came to be deposited with them for safe custody from whom the merchant could draw at any time and the money changer could with the money lend at remunerative rates to others.

During the next half-century more than once provision was made for public oversight of the campsores and in the Acts, the term *bancherius* and *bancus* became frequent, in what seems a technical sense. In time these banks came to realise that they could use not only the money actually deposited with them but also their credit. The banks became, to use modern terms, not only banks of deposit but also banks of issue. A direct result of this function was the growth of the political importance of the bank. The State soon found that its business was one of the undertakings which a bank would finance in return for privileges it could give. A State loan and a State bank in many different places and at many different times have been related as cause and effect. The idea of forming a fund to finance the State gave rise to the idea of forming a similar fund a *mons pietatis* to finance the poor and to deliver them from the clutches of the usurer. In Italy, in the sixteenth century, banks had come to play a very important part in the economic life of the State. But their importance made some measure of State control necessary both in the interests of the State and of its subjects. There was considerable legislation in Venice. At the end of the sixteenth century the most important banks in Europe were State or public banks. In England such a bank came to be established only after the Revolution. Till then, the goldsmiths used to do banking work. During the latter part of the seventeenth century, the growth of banking begins to be reflected in the reports by one or two cases which put a legal interpretation upon some parts of the machinery by which bankers did their business. These few cases and the statutes that established and regulated the Bank of England are the beginning of the English law of Banking. The reports show indications that the business will eventually add a new-species to each of the two classes of Negotiable Instruments known to mercantile law, the cheque and bank-note.

Mr. Frederick Edward Farrer completes his learned article on that species of bastard known as Bastard Eigne. The subject itself is not of interest to us in India but a passage from Coke is extracted which is as follows:—"If a man hath a wife and dyeth and within a very short time after the wife marrieth again and within nine months hath a child so as it may be the child of one or the other some have said, that in this case the childe may choose this father *quia in hoc casu filiatio non potest probari* and so is the booke to be intended."

"In another article, the first of a series, Mr. T. Bennett gives a general exposition of the legal principles which govern the position of Free Churches within the State. The term Free Church is often for convenience applied to denote only Evangelical Free Churches. In the division made by the law of the land, the term Free Church includes the Jewish, Roman Catholic and Unitarian Churches, in other words the term is used in the sense of *Non-Established Church*. No society of men can be wholly exempt from State control and Free Churches form no exception to this rule, but they differ from the *Established* Church in this that they are entirely free from State control as regards doctrine, government and discipline and it is this *freedom* which differentiates them from Established Churches. Before the Toleration Act of 1689 every form of worship except the particular form enforced by *Parliament* was forbidden by the law of the land. Down to the middle of the 19th century some taint of the old penal laws still cling round a certain number of Free Church places of worship which had been erected while persecuting statutes were still in force and it is only by the Non-Conformists' Chapels Act, 1844 were the effects of penal laws entirely swept away. In the present state of the law the question of lawfulness of Free Church rules and trust can hardly arise as a practical issue, though the possibility is not excluded. With the limitation that it may not break the law of the land a voluntary association (which a Free Church is) on its formation may make whatever rule it pleases with regard to its own special objects. The extent to which the Courts can be called upon to consider the rules of those associations is considered in, among others *Long* v. *Bishop of Cape Town* [1], and *Forbes* v. *Eden* [2]. "Save for the due disposal and administration of property there is no authority in Courts either of England or Scotland to take cognisance of the rules of a voluntary society entered into merely for the regulation of its own affairs. If funds are settled to be disposed of among members of a voluntary association according to their rules and regulations, the Court must necessarily take cognisance of those regulations for the purpose of satisfying itself as to who is entitled to the funds, &c. There is no jurisdiction in the Court of Session to reduce *i. e.* to annul the rules of a voluntary society indeed to inquire into them at all, except so far as may be necessary for some collateral purpose.""

1. 1 Moore P. C. N. S. 411.

2. L. R. 1 Sc. and D. 568.

If the rules set up a tribunal for inquiry into breach of regulations of the association, its conclusions will be enforced provided the procedure adopted is consistent with natural justice.

Mr. George J. Phillips argues that by the repudiation by Germany of its obligations under the declaration of Paris, 1856, the other Treaty powers are equally released from the obligations not only towards Germany but also towards the other neutrals who are parties to the Treaty. His contention is that treaties of this kind are not a number of separate agreements but one agreement between several parties and repudiation by one puts an end to the contract altogether.

An account of what is called *Ransom Bills* is given by Mr. W. Senior. Up to the end of the eighteenth century, it was permitted according to the usage of nations to captors of Enemy-ships to let go the ship on an undertaking by the Captain to pay a certain sum of money and action was held maintainable directly by the alien enemy in whose favour there was the bill, but in 1782 the practice was made illegal, though an exception is recognised in the case of Commandants of King's ships. Even now the practice is permitted to the Commandant of a King's ship provided it is not opposed to any Ordinances in Council.

BOOK REVIEW.

THE CENTURY REGISTRATION AND STAMP LAW, *by Mulchandra Ganguli Cranenberg Law Publishing House, Calcutta.*

This is a book of ready reference on the Stamp and Registration Laws. Practitioners find not a little difficulty when having to deal with the admissibility of documents in evidence under the old repealed Stamp and Registration Laws. The book under review is intended to satisfy the want in this direction of a book which gives all the repealed enactments on the questions of Stamp and Registration. It also gives a good deal of useful information such as chronological tables for over 100 years and a list of Civil Court holidays in Bengal, Behar, Orissa and Assam.

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NOTES OF INDIAN CASES.

Chandulal Dalsukh Ram *v.* Jeshangbhai Chhotalal: I. L. R. 41 B. 402.

It is curious that a question of the kind arising in this case should not have been the subject of any reported decision till now. A person who stands surety to prevent an attachment before judgment attempted to escape from the obligation of his bond by reason of the defendant's death during the pendency of the suit. There is much to be said in favour of the learned Judges' view that he ought not to be permitted to do so. But there is very little found in the judgment by way of reasoning. Cases like *Krishnan Nayar* v. *Ittiran Nayar* [1], *Subraya Chetty* v. *Ragammal* [2] and *Bai Somi* v. *Choksi Ishvardas* [3] afford very little guidance in finding out anything like a general principle of law and we may note in passing that the decision in *Raj Narain* v. *Ful Kumari* [4] is really irreconcileable with those in the Bombay case and in the second of the Madras cases above referred to. It is however significant that while the Code makes express provision for the discharge of one who stands surety "for the appearance of a defendant" (O. 38, rr. 3 and 4, C. P. C.) no such provision is made in the case of a surety under rules 5 and 6 of the same order. But we doubt if from this circumstance alone it can be concluded that a surety in the latter case can *never* claim to be discharged. As shown by the language of the rules and the form No. 6 in Appendix F. the surety in such a case undertakes that 'the defendant' (against whom the application has been made) shall produce and place at the disposal of the Court when required the property specified in the Schedule or the value thereof or such portion as may be sufficient to satisfy the decree and his own liability arises in default of the defendant so doing. Can it be said to be sufficiently clear that such a bond covers not merely a default on the part of 'the defendant' a person known to him, but also of some distant heir,

1. (1901) I.L.R. 24 M. 687.
2. (1904) I. L. R. 28 M. 161.
3. (1894) I. L. R. 19 B. 245.
4. (1901) I. L. R. 29 C. 68.

possibly one of whom he might have never heard, who may be brought on the record as the legal representative of the defendant? Could that have really been the intention of the party who stood surety? It may be as the learned Judges say that by reason of his surety bond the defendant was enabled to deal with the property freed from the threatened attachment; but this will only justify the surety being held liable in cases in which, and to the extent to which, the original defendant might have removed or alienated his properties and it would not reasonably follow therefrom that the surety should be held liable even for the acts or defaults of the legal representative. If all that the learned Judges in the present case meant to say was, that the matter should be discussed only after the termination of the suit and not before, the considerations above adverted to, may not bear on the decision, though we are not sure that S. 145, on which they rely, necessarily leads to that conclusion. The inclination of their opinion would however seem to be in favour of holding the surety liable even for the default of the legal representative. As for the effect of S. 145, a case like the present cannot be brought within the terms of sub-clause (*a*) or (*b*) of that section. The only words that may be called in aid from that section are those in clause (*c*) relating to "the fulfilment of any condition imposed on any person under an order of the Court." Here again, the question arises whether these words can cover the legal representative also. The matter is one of some importance as few persons could be found willing to come forward as sureties if they are to be held responsible not only for the acts of a person whom they know, but of some possible legal representative of his as well. We hope that it will receive a fuller discussion at an early date.

Bapu Apaji *v.* **Kashinath Sadoba**: I. L. R. 41 B. 438 (F. B.)

The judgment in this case dissents from the decision of a Full Bench of the Madras High Court in *Kurri Veera Reddi* v. *Kurri Bapi Reddi* [1], not upon the authority of any later pronouncement of the Privy Council, but upon the ground that the Madras decision relied exclusively on S. 54 of the Transfer of Property Act, and overlooked certain other statutory provisions and the clear inference arising therefrom. The basis of the

1. (1906) I. L. R. 29 M. 336.

present judgment seems to be that after a contract to sell, a vendor who has not executed and registered a sale deed is in the position of a trustee for the purchaser and it would therefore be improper to permit him to succeed in a suit in ejectment against the purchaser when he has himself put the purchaser in possession. The learned Judges point out that while S. 91 of the Trusts Act imposes on a subsequent transferee from the vendor an obligation in the nature of a trust in favour of the original purchaser, it will be anomalous to put the vendor himself on a better footing and give him liberty to recover possession against his own contract. It may be pointed out that on this question of the position of a subsequent transferee with notice as against the earlier vendee in possession though without a perfected legal title, the Madras, Bombay, and Calcutta High Courts are agreed (see *Tiruvengadathiengar* v. *Seshadri Iyengar* [1], *Gangaram* v. *Laxman* [2], and *Pucha Lal* v. *Kunj Behari* [3]; but as regards the vendor himself the Calcutta Court has held, dissenting from the Madras Full Bench decision, that in spite of S. 54 of the Transfer of Property Act, a vendee may rely upon the mere contract as an answer to a suit for possession by the vendor (see *Khagendra* v. *Sonatham* [4].) In adopting the same course now, the Bombay High Court point out the anomaly of putting the vendor on a better footing than the second transferee from him. This aspect of the matter was noticed by Srinivasa Iyengar, J., in *Tiruvengadathiengar* v. *Seshadri Iyengar* [1], and he ultimately relied on the express terms of S. 91 of the Trusts Act and preferred not to extend the earlier Full Bench case beyond its actual facts.

The result of adopting the reasoning relied on in the Bombay case under notice seems, however, to involve some conflict with other statutory provisions. If from the date of the contract to sell, the vendor is to be treated as a trustee for the purchaser—and this is practically the English rule as to the transfer of equitable ownership from the date of the contract—it is difficult to find anything in principle to exclude what is held in England to follow as a corollary, namely, that from such date the vendee will be entitled to the profits from the property and bound to bear the risk arising from the destruction etc. of the property; but on this point the law in India is expressly declared to be otherwise in

1. (1916) 30 M. L. J. 559.
2. (1916) I. L. R. 40 B. 498.
3. (1913) 19 C. L J. 213.
4. (1915) 20 C. W. N. 11.

S. 5J of the Transfer of Property Act. This matter was referred to though not decided by their Lordships of the Privy Council in the recent case of *Maung Shwe Goh* v. *Maung Inn* [1], where their Lordships observed that this theory of the equitable ownership of the purchaser is inconsistent with the statute law of India; *cf.* also *Ellarayan* v. *Nagendra* [2] and *Subbaraya* v. *Kottaya* [3]. This aspect of the question does not appear to have been considered by the learned Judges of the Bombay High Court.

Before concluding this notice, we may point out that in a recent case in Madras *Ramanathan Chetti* v. *Ranganathan Chetti* [4], and also *Ramanadhan Chetti* v. *Ramaswami Chetti* [5] another way out of the strict rule laid down by the Full Bench has been suggested by Wallis, C. J., and Abdur Rahim, J., based upon the equities arising from the *actings of* the parties. The Chief Justice even remarks that the Full Bench decision may require to be re-considered in the light of the very wide observations of the Judicial Committee in *Mohamed Musa* v *Aghore Kumar* [6]; but Mr. Abdur Rahim, J., does not seem to go so far as that. As to the equitable estoppel, however, they point out that it will arise not from the mere delivery of possession in pursuance of the contract, but only from other acts of the parties subsequent thereto. The three other learned Judges (Seshagiri Iyer, Sadasiva Iyer, and Napier, JJ.) who took part in the case were of opinion that there was no basis for any such equitable estoppel.

We may also point out that in a contract to sell, there may be an express agreement to put the vendee in possession, even apart from and before the date of the execution of the registered sale deed. In such a case, the vendee's possession rests not upon his title but upon the contract so far as it related to possession; and this he may set up in answer to the vendor's suit either for possession or for mesne profits. This aspect of the matter was not adverted to in the Madras Full Bench case, but, some observations bearing upon it will be found in the judgment of Srinivasa Iyengar, J., in *Rengayya* v. *Subramanya* [7]. See also *Maniyan* v. *Kuppanna Gounden* [8].

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1. (1916) I. L. R. 44 C 542.
2. (1917) 6 L. W. 283.
3. (1916) M. W. N. 284
4. (1917) 33 M. L. J. 252.
5. (1915) 30 M L. J. 7.
6. (1915) I. L. R. 42 C. 801.
7. (1917) 32 M. L. J. 575.
8. (1915) 1 M. W. N. 319.

Mina Kumari Bibi *v.* **Bijoy Singh** : I. L. R. 44 C. 662. (P.C.)

Their Lordships in this case draw attention to the difference, sometimes lost sight of, between a nominal or a sham transaction in the true sense and a fraudulent transfer within the meaning of S. 53 of the Transfer of Property Act. They also recognise, for what it is worth, "a general though not a conclusive presumption that a document was made on the day of the date it bears," and they reaffirm the well-established rule that a decision of the Court "must rest not upon suspicion but upon legal grounds established by legal testimony." The main point decided in the case relates to the right of a decree-holder who has merely applied for rateable distribution to question an alienation by the judgment-debtor. The case was governed by the Code of 1882 which contained nothing corresponding to the explanation to S. 64 in the present Code. One aspect of the question before the Board related to the correctness of the decision in *Sorabji* v. *Govind* [1], and the other aspect turned upon the effect of S. 276. The precise scope of their Lordships' decision and its applicability to cases governed by the new Code recently came up for consideration before a Full Bench of the Madras High Court, *Annamali Chettiar* v. *Palamali Pillai* [2], and the learned Judges held the rule to be, that a decree-holder cannot protect himself against an alienation by the judgment-debtor even after attachment unless and except so far as the attached property is brought to sale in execution of the decree in respect of which the attachment was made. It can scarcely be denied that there is great force in the view of Mr. Justice Bakewell that any transaction between the attaching decree-holder and the judgment-debtor whereby a particular attachment may cease without the concurrence of or the satisfaction of the claims of other decree-holders who may have applied for rateable distribution, ought not to prejudice the latter, but the Full Bench think that even the explanation now added to S. 64 falls short of affording protection in such cases and that the remedy is in the hands of the legislature.

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1. (1891) I. L. R. 16 B. 91.
2. (1917) 33 M. L. J. 707.

Gururao Shrinivas *v.* **The Secretary of State:** I. L. R. 41 B. 408.

The effect of the resumption of a Saranjam, on the land here-to-fore in the possession of the Saranjamdar, was the question for consideration in this case. We do not see why the analogy of ordinary Inams should not be applied here, even as in the case of 'Jaghirs'; and if, as the learned Judges hold, the Saranjam grant is *prima facie* to be regarded as comprising the land revenue alone, the resumption cannot affect the right to the *possession* of the land, though it may entail the payment of the full assessment. The reasoning and conclusion in the case under notice substantially correspond to those in *Venkata* v. *Rama*, [1] and *Narayana* v. *Chengalamma* [2], the difference pointed out in the later Madras cases between 'resumption' and 'enfranchisement' being immaterial for the present purpose.

Dadasaheb Dasarath rao *v.* **Bai Nahani:** I. L. R. 41 B. 480.

The point for decision in this case was as to the effect of a sale by a minor representing himself to be a major. The learned Judges held that the vendor was estopped from pleading his minority.

We cannot help feeling that in basing their decision almost exclusively on the meaning of the word 'person,' in S. 115 of the Evidence Act the learned Judges have dealt rather summarily with a question which is by no means free from doubt or difficulty. The authority relied on *viz.*, *Ganesh Lala* v. *Bapu* [3], carries us little further and it is to be regretted that the learned Judges have not attempted to meet the observations of Jenkins, J. (as he then was) on that case. (See *Dharmodass Ghose* v. *Brahmo Datt* [4]). We quite agree that estoppel, properly so called, is different from the legal consequences of fraudulent misrepresentation by a minor and it may be that in many of the reported cases the two questions are not sufficiently kept apart. But the learned Judges do not seem sufficiently to realise that the result of their view would in a large measure nullify the effect of S. 11 of the Contract Act which, both on principle and by force of Ss. 4 and 7 of

1. (1884) I. L. R. 8 M. 249.
2. (1886) I. L. R. 10 M. 1.
3. (1895) I. L. R. 21 B 198.
4. (1898) I. L. R. 25 C. 616 at p. 623.

the Transfer of Property Act, would apply to transfers of property as well. For, just as it is true that no fraudulent or even intentional misrepresentation is necessary to give rise to an estoppel it is equally established that no express representation is necessary either and the mere fact of the infant entering into the transaction will, at any rate in cases in which the other party had no reason to suspect the infancy be sufficient to constitute a basis for estoppel and thus make the contract enforceable. This is the consideration which underlies the English rule that even a fraudulent misrepresentation as to age, will not deprive an infant of the plea of infancy, in so far as the question arises in actions *excontractu*, (See *Liverpool L. A. Association* v. *Fairhurst* [1]); and we fail to see any reason why the same consideration should not hold good in India also. It is no answer to say that S. 115 of the Evidence Act enacts no such exception, when it has generally been accepted that it was not meant to enact anything different from the rule in England; and it will be scarcely reasonable so to construe that section as practically to nullify another section in a special law (*viz.*, the Contract Act) passed by the same legislature in the same year. It is submitted that it is taking too narrow a view in the interpretation of the law, to lay stress merely upon the wide connotation of the word 'person.' True, the language of S. 115 of the Evidence Act may cover the case, but it is an equally well-established rule that there can be no estoppel against a statutory provision and we do not see that the terms of S. 115 are such as to compel the court to shut its ears to a plea of minority and ignore S. 11 of the Contract Act. The correct position would seem to be that indicated by Messrs. Ameer Ali and Woodroffe in their notes to S. 115. *viz.*, that "the law relating to estoppel must be read together with and subject to other laws in force * * *, and that where such laws declare an infant to be free of liability in respect of a particular transaction he cannot be made liable by virtue of an estoppel but that in other cases an infant may be estopped." (See also per Bannerjee, J. in *Jagar Nath* v. *Lalta Prasad* [2]). We may observe in passing that the decision in *Surendranath Roy* v. *Krishnasakhi Dasi* [3], though it upholds a sale by a minor, is rested by the learned Judges not on the general law of estoppel but on a finding of fraudulent misrepresentation as to age. Whether even on this footing,

1. (1854) 9 Ex. 422. 2 (1908) I. L. R. 31 A. at p. 27.
3. (1911) 13 C. L. J. 228.

the decision is sound is a different matter, to which we shall presently refer.

It has been assumed in more than one recent case in India that where there is a fraudulent misrepresentation as to age by a minor, in connection with a contract entered into by him, the other party, if deceived thereby, can get equitable relief which may sometimes even assume the form of a decree for repayment of the money received. (Cf. *Dharmadoss* v. *Brahmo Dutt* [1], *Jagar Nath* v. *Lalta Prasad* [2], *Vaikuntarama Pillai* v. *Athimoolam Chettiar* [3].) And more than one early decision in England and several dicta even in recent cases can be cited in support of this view; but the question was elaborately discussed by the Court of Appeal in the recent case of *Leslie Limited* v. *Sheill* [4], and it was unanimously held that the doctrine of the equitable liability of the minor in case of fraudulent misrepresentation would not warrant restitution in the sense of a general decree for repayment of moneys received. The judgment reviews all the earlier authorities and substantially overrules the decision in *Stocks* v. *Wilson* [5], referred to by Wallis, C. J. in *Vaikuntarama* v. *Authimoolam* [3],

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1. (1898) I. L. R. 25 C. 616.
2. (1908) I. L. R. 31 A. 21.
3. (1914) 26 M. L. J. 612.
4. (1914) 3 K. B. 607.
5. (1913) L. R. 2 K. B. 235.

Chhotalal Adit Ram v. Bai Maha Kore: I. L. R. 41 B. 466.

The precise bearing of the rules of the Law of Evidence and of Registration on instruments of partition has not even yet been sufficiently settled so as to secure uniformity in the application of the law. A deed of partition in the proper sense of the term ordinarily contains a declaration of division of status, as also the details of the terms of partition and quite frequently it deals with moveable as well as immoveable properties. Oftentimes it also recites prior incomplete arrangements between the parties or references to mediators or arbitrators as well as their settlement or award as the case may be. How far different portions of such a document can be separated one from another, what is the effect of Ss. 17 and 49 of the Registration Act on the admissibility of such a document and if the document itself is to be held inadmissible, whether and if so, how much of the arrangement can be proved by other evidence either as to what happened at the time or by way of subsequent enjoyment, are questions, in respect of every one of which, the authorities are not all one way. In a very recent case for instance, *Pothi Naickan* v. *Naganna Naickar* [1] a Full Bench of the Madras High Court held that a partition deed which was refused registration on the ground among others, that it did not contain a detailed description of the property as required by the Registration law, was nevertheless inadmissible even to prove a division in status: so far, on the registration law. Proceeding further, the learned Judges also held, as a question of the probable intention of the parties, that it could not have been meant as a partition of the moveables alone apart from the immoveables, and one learned Judge also intimated that the parties could not have intended a mere division in status taking place without the deed itself operating as a valid division. Judged by this standard, it appears to us well nigh impossible to establish a division in status in any case in which a partition of properties both moveable and immoveable has been effected by a partition deed in the ordinary form but left unregistered. Though the Full Bench do not in terms meet the reasoning of Justice Sankaran Nair in that case their decision in effect overrules his theory that a mere severance of status (as distinguished from allotment of particular properties to particular members) is not a transaction creating or extinguishing an interest in immoveable property within the meaning of the

1. (1915) 30 M. L. J. 62. (F. B.)

Registration Law. This also disposes of his judgment in *Subramania Aiyar* v. *Savithri Ammal* [1]. If the document is *as such* inoperative and inadmissible, it is difficult to see how the mere fact of the parties having entered into such an arrangement can be held to amount to a division. But where the parties have gone further and enjoyed their shares as per such an arrangement, the question arises, can such enjoyment be proved and relied on as amounting to a partition, though the initial act was both inoperative and incapable of being legally proved? The point seems to us by no means so simple or clear as the learned Judges of the Bombay High Court seem to regard it in the case under notice. No doubt the plaintiff there came forward with the case that he and the deceased husband of the defendant were undivided in respect of the properties in question. But once he showed that the properties were ancestral the presumption of Hindu Law was in his favour and it was for the defence to prove that the *particular properties* had become the separate properties of the deceased. If the document by which this was brought about was inadmissible and inoperative it is difficult to see how the English rule as to proof "of the existence of a particular relationship" without production of the document itself can help the defence. In relying on analogies from the English law it has to be remembered in this connection that S. 49 of the Registration Act not merely lays down a rule of evidence by excluding unregistered documents but also enacts a substantive rule declaring them inoperative, as against the immoveable property comprised therein. In this view the prior or subsequent conduct of the parties, in so far as it merely led up to or was founded upon such document, cannot properly be regarded as by itself constituting an independent legal Act whatever consequences may follow by operation of the rule of estoppel or the law of limitation.

Balakrishna Udayar *v.* **Vasudeva Ayyar**: I. L. R. 40 M. 793. (P. C.)

Opinion had been expressed that orders passed under Sec. 10 and other sections of the Religious Endowments Act are orders passed by the District Judge as *persona designata* administratively or ministerially and are not revisable by the High Court. The judgment of the Privy Council in *Minakshi* v. *Subramanya* [2];

1. (1908) 19 M. L. J. 228.
2. (1887) I. L. R. 11 M. 26. (P. C).

lent some color to that view. In this case, however, their Lordships dissent from that view and hold that the orders are judicial orders passed by the Dt. Court as a Court and are revisable in proper cases. In their Lordships' view, the word "case" in S. 115, C. P. C. cannot be confined to litigations in which there is a plaintiff who seeks to obtain a particular relief in damages or otherwise against a defendant who is before the Court but must also include an application praying that persons in the position of trustees or officials should perform their trust or discharge their official duties. The order in this case was an order of the Court refusing to appoint a committee member or direct the appointment of one by the Committee ignoring a prior election under the orders of the District Judge. Their Lordships hold that it was a case decided by the District Judge and the petition came within S. 115 which their Lordships say is confined to questions of jurisdiction alone, the illegal exercise or non-exercise of it or the illegal assumption of it and not directed against conclusions of law and fact in which the question of jurisdiction is not involved.

On the merits, their Lordships hold that the District Judge could either appoint himself or direct an appointment by the committee members but could not direct the members to hold an election.

Thevaraya Reddy *v.* **Venkatachalam Pandithan**: I. L. R. 40 M. 804 (F. B.)

We must confess we are more impressed by the argument that a deposit that is cancelled or withdrawn is no longer a deposit than by the arguments based upon the other words of the section. The words "as soon as the mortgagor has done all that has to be done by him to enable the mortgagee to take such amount out of court" cannot have reference to a fact like allowing the deposit to continue so as to enable the heirs of the mortgagee to settle their dispute for if that is the right view, the interest will cease only after the expiration of such period which for obvious reasons, cannot be the intention of the section. We think those words have reference only to the notice provided in Ss. 83, 102 and 103. We do not believe that it is open to the mortgagor to call upon the contesting claimants to the money standing in the deceased man's name to a joint receipt. He is either to name the persons whom he recognises as heirs and give notice to them

in which case he acts at his peril or stating that he is unable to decide, ask the court to act under S. 102. If he does what the section requires or in the latter case what the court asks him to do, he has done all that he is required to do and interest will cease. The reasoning of this case may have the effect of postponing the cessation of interest to the period necessary for determining the question of heirship while the considerations referred to by Mr. Justice Seshagiri Iyer do require that the money should be in court deposit. Arguments based on the analogy of tender are hardly of any use.

Saravena Pillai *v.* **Arunachalam Chettiyar**: I. L. R. 40 M. 841.

If the act is an administrative or non-judicial act, how did the High Court have jurisdiction to interfere under S. 115, Civil Procedure Code? We rather think that the order is a judicial order, though of a summary and provisional kind, passed in the course of administration. There is much to be said in favour of the view taken as to the power of the court to go behind the decree. If a creditor has got to set aside a fraudulent alienation before he can attach the property, it would seem to follow that he has got to set aside fraudulent decree as well. Decrees and alienations are all clubbed together in Statute 13 Elizabeth and dealt with alike though the section of the Transfer of Property Act according to the scheme of the Act is confined to alienations of immoveable property. Reading S. 73, Civil Procedure Code, it looks as if the test of the right of distribution is a *de facto* execution application in respect of a decree to which there is no defence. Obviously, fraud in obtaining the decree would not be an answer to the application and should similarly we think not afford an answer to the claim for rateable distribution. Has the creditor to set aside the decree and get restitution of the amount for the general body of creditors or is he to sue directly for the amount taken by the fraudulent judgment creditor under S. 73, Civil Procedure Code?

Tricomdas Cooverji Bhoja *v.* Gopinath Jiuthakur. I. L. R. 44 C. 759.

We can scarcely take it that their Lordships in this case *decided* royalties to be rent in the legal sense. Proceeding however to discuss the question of limitation on that assumption they hold that Art. 116 governs a suit for rent where it arises on a registered document. The conclusion is rested substantially on the ground of *stare decisis*. Of course the Indian legislature has consistently conferred certain advantages on parties claiming under registered documents but so far as the Limitation Act is concerned the policy would seem to be sufficiently satisfied by the difference in *period* between Art. 115 and 116. Comparing the substantive description of the claim in the first column of the two articles as well as the language of the third column fixing the starting point in both, one cannot help feeling that both the articles were intended to be co-extensive, the difference existing only as regards the period of limitation. But the absence of the words 'not herein specially provided for' from Art. 116 has led courts in India to give a very wide application to that article superseding special articles applicable to special cases and placing an almost strained interpretation upon the word 'compensation.' This was humbly protested against by *Sundara Aiyar, J.* in *Yellammal* v *Ayyappa Naick* [1], pointing out that such a view did not sufficiently take into account 'the scheme of the Limitation Act.' Their Lordships of the Judicial committee, however, think that the established view cannot be said to be clearly against the language of the statute and the matter must anyhow be taken to be now settled by their Lordships' decision.

Bamandas Bhattacharjee *v.* Nilmadhab Saha.; I. L. R. 44 C. 771.

We venture to doubt the correctness of applying the rule of estoppel to the facts of this case. The suit was for arrears of rent under a lease and for damages for breach of covenant by the tenant. The question was raised whether the lease was not void as being in contravention of S. 85 cl. 2 of the Bengal Tenancy Act. If the court was prepared to hold that that section did not render the lease inoperative *as between the lessor and the lessee* it was scarcely necessary to discuss any other question. If however the section could be held to make the lease void even as between the parties, it is difficult to see how any rule of estoppel

1. (1912) I. L. R. 38 M. at pp. 975, 976.

will make the *covenants* of the lease enforceable. There will also arise the question whether there can be any estoppel against a statutory prohibition. It certainly cannot be asserted as a broad proposition of law that a lessee can never set up that the lease was void. Suppose the lease was for an illegal or immoral purpose; he can in spite of having entered into possession under the lease escape payment of rent by pleading the unenforceability of the contract. Or, take the grant of a perpetual lease by a trustee; it is settled law that such a lease is void and if the lessee continues in possession for 12 years he would acquire a perpetual tenure by adverse possession. The natural corollary from this is that the trustee himself could sue to recover possession in the face of his own lease. It therefore seems to us unwarranted to assume, as the learned judges seem to do, that if in the case before them the lessors had sued to eject the lessees on the plea that the lease was void under S. 85 Cl. 2, the latter would plainly have been entitled to rely on the doctrine of estoppel to defend their position. Even in ordinary cases we should think that the lessee's right to remain in possession as against his lessor cannot be properly rested on any rule of estoppel properly so called, but arises out of the legal covenant for quiet enjoyment. We are unable to agree that the estoppel enacted under S. 116 of the Evidence Act relates to the power of the lessor to grant the lease, in the sense, of making every covenant of the lease enforceable at the instance of the lessor. Much less then can it override a statutory prohibition against certain kinds of leases.

Ruttonji Rowji *v.* The Bombay United Spinning and Weaving & Co., I. L. R. 41 B. 518.

We have some difficulty in following the decision on one of the points in this case. The contract was for sale of goods to be made as per sample and there was an arbitration clause for the decision of any dispute between the parties as to the quality, finish etc., of the goods. On a contention by the plaintiffs that the goods were not up to the sample, the arbitrators found in their favour but in accordance with a trade custom they directed that the plaintiffs must nevertheless take them with an allowance on the price. The trial Judge and one Judge in the Appellate Court hold that the trade custom cannot be pleaded in the case, being inconsistent with the express terms of the contract, but in the end they give effect to the award. The exact basis of Justice

Macleod's decision does not clearly appear from the report; but the Appellate Court rest their conclusion on a narrow and, as we venture to think, a doubtful ground. Though the reference to arbitration was substantially in the terms of the contract, the learned Judges take the view that in the course of the arbitration, plaintiffs themselves suggested to one of the arbitrators that, in the event of the quality being found to be inferior, they may fix an allowance on the price, that the defendant's man did not object to this course and that accordingly the scope of the arbitration became enlarged. This seems to us a very strange inference, especially when it is borne in mind that the arbitrators must have been acting not on any such implied enlargement of the reference but on the proved practice obtaining in such cases whatever its legal validity may be and that as a matter of fact, in a few days, each of the parties repudiated one or another portion of the award in so far as it went outside the original reference. As it turned out, it is no doubt the plaintiffs who objected to the direction to accept the goods with an allowance. If however the defendants had raised the objection, say for instance to the *rate* allowed, it would be difficult to hold that the award would be binding on them merely because their salesman did not object to the plaintiff's suggestion in the course of the arbitration.

On the question of the admissibility of proof of the trade custom it appears to us that a different view may be reasonably taken, the matter not being exactly one relating to the *terms* of the contract. The contract is one of sale as per sample and *it is the law that provides for the consequence* where the goods supplied are not up to sample. The custom proved in the case would in this view amount to a kind of proviso to the absolute right of rejection enacted by S. 118 of the Contract Act and this certainly is allowed by the saving clause to S. 1 of the Act. This way of looking at the matter is to a certain extent justified by the words used even by Fletcher Moulton, L. J. in *In re N. W. Rubber Co., &c.* [1], when the learned Lord Justice speaks of the arbitrators having decided the dispute not according to the English law, but on some mercantile law of their own imagination. The alleged custom having been found against in that case, one may be pardoned for not accepting as authoritative the opinion expressed as to the inadmissibility of proof of the custom, especially in the face of other opinions to the contrary.

1. L. R. (1908) 2 K. B. 907.

Somasundaram Chettiar *v.* **Vaithilinga Mudaliar** : I. L. R. 40 M. 846.

It is an extremely curious state of affairs that while the order of Sudra monks is recognised by our courts, they should, in a spirit of inconsistent antiquarianism, hold at the same time, that such monkhood has not in the matter of inheritance or succession the same consequences as among the higher orders to whom that state of life is permitted under the law. Even the strict Hindu Law of the Smritis recognises what is called the *Samayika Dharma* of Naigamas, Pashandis (heritical sects), etc. One of the rules of the brotherhood undoubtedly is that the Tambirans should not possess property. It will be found that the Agamas do contemplate Sudra Sanyasis. See Gopinatha Rao's Iconography, Vol. ii. It passes one's comprehension why the rule should not be enforced either as *Samayika Dharma* or as a necessary implication of the recognition of the order of Tambirans.

One of the important questions discussed in the case was as to the effect of the bar by limitation under Art. 129 of the Act of 1871 of the then reversioner on the actual reversioner whose right accrued in 1904. Their Lordships hold that though the effect of the decision in *Tirbhuvan Bahadur Singh* v. *Rameshur Baksh Singh* [1], is that a title is not thereby acquired by the adopted son to the status of adopted son and will not avail when collateral succession is in question, when there is possession of the property in the adopted son, the suit will be barred. The position is undoubtedly anomalous but we have analogous cases, governed by Art. 91, 44, 120. (case of a trustee not being a hereditary trustee) etc.

In *Harinath Chatterjee* v. *Mothurmohun Goswami* [2], their Lordships of the Privy Council held that a decision on a point of limitation against the widow was *res judicata* against the reversioner. But this decision has been rightly confined, we think, to cases where the ground of limitation applies equally to the widow and the reversioner. The case itself was one in which the Act of 1859 had barred the right. (See also *Jalandhar Thakur* v. *Jharula Das* [3], *Braja Lal Sen* v. *Jibar Krishna Roy* [4], *Amrita Das* v. *Bindeshri Prasad* [5].

1. (1906) I. L. R 28 A. 727. 2. (1893) I. L. R. 21 C. 8.
3. (1914) I. L. R. 42 C. 244. (P. C.) 4. (1898) I. L. R 26 C. 285.
5. (1901) I. L. R. 23 A. 448.

Dawal Poranshah *v.* **Dharma Raja Ram.** I. L. R. 41 B. 550.

The question has frequently arisen of late as to the effect of the existence of an unregistered sale-deed in connection with sales of immovable property worth less than 100 Rs. It may now be taken as settled, that such a sale deed by itself, will not effectuate a transfer of the property, for S. 54 of the Transfer of Property Act prescribes delivery of possession in such cases as the only alternative in the absence of a registered instrument. But it has often been argued and sometimes even held that an unregistered sale-deed may practically *prevent* the passing of property even by delivery of possession. This is in effect the result of the decision in *Muthu Karuppan* v. *Muthu* 1. The learned Judges no doubt there observe that " no oral sale has been pleaded," and on this footing it is said (by Sadasivaiyar, J.) in *Kathari Narasimha Raju* v. *Bhupati Raju* 2 " to have been decided on a very strict construction of the pleadings." But if, as the learned judges hold, the unregistered sale deed is excluded from evidence by S. 49 of the Registration Act, it is difficult to see how in the face of S. 91 of the Evidence Act any oral sale can be pleaded and proved (as observed by Beaman, J. in the present case) unless it was one quite independent of and unconnected with the transaction that culminated in the unregistered deed. The true question therefore is, whether the unregistered deed is in such cases excluded by S. 49 of the Registration Act which in turn, depends upon the further question whether S. 54 of the Transfer of Property Act read with the concluding portion of S. 4 prescribes registration as compulsory within the meaning of S. 17 of the Registration Act in the case of *all* instruments of sale whatever the value of the property conveyed. The affirmative is maintained by Mr. Justice Beaman in the case under notice and he is supported by the decision in *Muthu Karuppan* v. *Muthu* 1. In the same category must be included, *Kakki Sobhandhri* v. *Muthu Rangaya* 3 and *Vairananda Nadar* v. *Miyakan-Rowter* 4 relating to leases, though they are capable of being distinguished in view of the form in which the question arose for discussion in those cases. The negative view taken by Macleod, J. in the present case is however the one which has found favour in the majority of recent cases (see *Kathari Narasimha* v. *Bhupati Raju* 2 and the cases there cited; *Poomali*

1. (1914) I. L. R. 37 M. 1158.
2. (1915) 29 M. L. J. 721.
3. (1909) I. L. R. 32 M, 592.
4. (1898) I L. R. 21 M. 109.

Udayan v. *Karuppa Servai* 1) and is more consistent with the fact that even when re-enacting the Registration Act in 1908 the Legislature has retained S. 17, as before—a circumstance not sufficiently accounted for, by the mere possibility of difference in local application between the Transfer of Property Act and the Registration Act.

Mahomed Ghouse Rahman *v.* Nathu Yellabhji : I. L. R. 40 M. 835.

The same points arose for decision in *Charu Chandra Majumdar* v. *Emperor* [2]. Mr. Justice Mukherji who considers all the points is of opinion (i) that the order passed under S. 185 is not an order of transfer, though in effect it is that, (ii) that to give jurisdiction, it is not necessary that there should be two proceedings actually pending, (iii) that the doubt may be on the question of convenience. The majority consider by reason of the admissions of counsel only point No. 3 in the case. We should prefer the conclusion of the Calcutta Court because we do not believe that one High Court will or can disregard the decision of another High Court on which jurisdiction is expressly conferred by S. 185 of the Criminal Procedure Code to decide the question and the language "inquired into" or "tried" is not sufficiently clear to raise the inference that the case must already have been instituted.

In the absence of comity between the courts, we do not see how the accused can be detained by one Court more than removed by another Court.

Navaneetha Krishna Tevar *v.* Ramaswami Pandia Talavar : I. L. R. 40 M. 871.

The proposition laid down in this case, namely that the Court of Wards taking possession of an estate from a disqualified proprietor (a proprietor may be a mere life estate holder) has the power to sell or mortgage for debts (which may be his or her own debts, debts not binding the reversioner) cannot be accepted as sound in the absence of language to compel such a construction. We must confess we do not see any such compelling language

1. (1916) 2 M. W. N. 136 ; See also S. A 190 and 378 of 1916 : 2 I. C. 413 (Cal).
2. (1916) I. L. R. 44 C. 595. (F. B.)

in the section referred to and the power can without undue straining very well be circumscribed by reference to the *nature* of the estate and *powers* of the proprietor.

Ayyasami Aiyar *v.* **Venkatachella Mudali**: I. L. R. 40 M. 989 F. B.

This case must be taken to be overruled by the judgment of the Privy Council in *Khulna Loan Company* v. *Jnanendra Nath Bose* [1]. In the case before the Privy Council, as in this case, the decree directed the available sale proceeds to be paid in satisfaction of the decretal debt but if that was insufficient, that the balance might be realised from the other properties and the persons of the debtors. The High Court held that the date of the decree for the purposes of S. 48, C. P. C. sought to be executed against the other properties was the date which the decree bore and could not be any later date. They similarly rejected the argument that the direction must be taken to be a direction to pay at a certain date within the meaning of that Section. The Privy Council say that they see no reason to differ from the judgment of the High Court. The decision precisely covers the point decided by the Full Bench. What ulterior consequences the judgment of the Privy Council may have, remains to be seen. The ratio of the decision may affect though not necessarily the interpretation put upon art. 182 by this court, *viz.*, that that article cannot apply when the decree is not executable at any of the starting points mentioned therein. It need hardly be stated that this decision would not cover a case where there is a supplemental decree under Order 34 Rule 6.

Mylapore Permanent Benefit Fund *v.* **Arokiasamy Pillai**: I. L. R. 40 M. 1004.

The suit in this case being one for redemption, no question of set off under O. VIII R. 6 could properly arise. The question was more one of appropriation. In *Ahmedabad Advance Spinning and Weaving Company* v. *Lakshmi Shenkar* [2], a question of set-off arose. There the question was whether a debtor of the firm (who also happened to be a director and shareholder) could set-off against the claim of the liquidator in respect of it, a debt due from the Com-

1. (1917) 22 C. W. N. 145. 2. (1916) I. L. R. 30 B. 173.

pany to himself. Their Lordships held he could. The present case, however, was different. The discussion in this case (rightly or wrongly) proceeded on the basis that on one side, there was a claim in respect of the calls—on the other, a claim in the nature of a debt owing to payment of subscriptions. On the footing on which the discussion proceeded, we think the conclusion is right. Apart from the ordinary liability on the calls, there is an independent statutory liability cast upon certain classes of persons named contributories by S. 156 of the Companies Act of 1913 (and the corresponding sections of the previous Acts) to make certain payments. This is not a liability to the Company as such from which the debt is due and therefore any claim to set-off is obviously inadmissible. Similarly under S. 156 (1) (vii) the sum due to any member in his character as member is not to be deemed a debt in a case of competition between himself and any other creditor. The necessary effect of this rule would seem to be that the claim is not pleadable as against the liquidator who represents the body of creditors. As between the contributories any rule that provides that the claim in respect of paid up calls should be set-off against the Company's claim against him may be given effect to.

Tirumalaisami *v.* **Subrahmanian**: I L. R. 40 M. 1009.

Two questions arose in this case: first whether there is a right of suit similar to that conferred by S. 315, C. P. C. of 1882 even under the New Code. Secondly, whether the right is preserved by S. 6 of the General Clauses Act even though the finding that the property did not belong to the judgment debtor was given after the coming into force of the New Code. Their Lordships held on the first point, that there was no such right under the New Code but on the second point, they held that the right was preserved by S. 6. On the first point, as we have said before, the point is fairly arguable whether an action should not be held to lie as for existing consideration failing or for money had to the use of and this aspect of the case has not been considered in the case under review. On the second point, the right conferred by S. 315 is, we think, a substantive right and the New Code of Civil Procedure cannot affect such right irrespective of the questions whether the right to apply had or had not accrued, and whether the right to apply under the New Code is or is not barred.

Ranjit Singh Bahadur *v.* **Kali Das Debi** : I. L. R 44, C. 841, P. C.

The Judgment in this case lays down little that is new though the observations of Lord Parker in this and in the Urlam case may well be referred to for a clear analytical statement of the principles of the Permanent Settlement in certain aspects. It is however interesting to note their Lordships' view as to the effect of a transfer of Chakaran lands to the Zemindar under S. 51 of Bengal Act VI of 1870. It substantially corresponds to the theory now accepted in Madras with reference to the effect of enfranchisement, *viz.* that the estate is not taken as under a fresh grant but only in confirmation and by way of continuance of an existing title.

Basanta Kumar Roy *v.* **Secretary of State for India**: I. L. R. 44 C. 858. (P. C.)

Several aspects of the doctrine of dispossession and adverse possession are touched on in the judgment of Lord Sumner but in view of their conclusion on questions of fact it was not necessary for their Lordships to express any definite opinion on any of these. Two points of general principle are however clearly laid down, one, that periods of successive possession by two holders cannot be tacked together for the purpose of Art. 144 except when the second claims through the first possessor; the other that there can be neither dispossession nor discontinuance of possession for the purpose of Art. 142 nor adverse possession for the purpose of Art. 144 'when the land is not capable of use and enjoyment.' Some observations bearing on certain of the topics raised in the case will be found in an Article at p. 73 of the XXXII volume of this journal.

Towards the conclusion of their judgment their Lordships advert to the question of the effect of possession by Government as against an owner under the guardianship of the Court of Wards. The High Court held—and on this point 'their Lordships do not wish to be taken as expressing any opinion adverse to their view'—that there was 'no authority for the proposition that the Government and the Court of Wards are in any sense identical......The Court of Wards is a statutory body and in this province no doubt the Board of Revenue is the Court of Wards. But that is not enough to make the possession of Government the possession of the plaintiffs by the Court of Wards.' (*Gurudas* v. *Kumara*

Basanta [1], Reference may be made in this connection to *Gour Chandra Gajapati* v. *Secretary of State* [2], where also the possibility of adverse possession by the ward (through the Collector) as against the Government was recognised—though negatived on the evidence. The principle underlying this view was laid down as early as 1870 in *Sheoraj Singh* v. *The Collector of Moradabad* [3], relied on by the Calcutta High Court. But while there can be little doubt as to its theoretical correctness, it can scarcely be denied that it may sometimes lead to practical difficulty. Where the adverse possession by Government *commences* during the minority of the ward, there is at least the chance of having three years after attaining majority to assert his rights ; but if the adverse possession had commenced already there may often be little likelihood of anybody coming forward to assert the right of the ward in the face of a deliberate opinion formed by the Collector that the property belonged to Government and the ward may thus have no chance at all.

Isap Ahmed *v.* Abhramji : I. L. R. 41 B. 588. (F. B.)

This decision of the Full Bench brings the Bombay view, as to the scope of Art. 127 of the Limitation Act, into line with that heretofore adopted by all the other High Courts in India, *i. e.* that it applies only to Hindus and such non-Hindus as have adopted 'as a custom' the Hindu Law as to the joint family. We do not feel much pressed by the ground on which Mr. Justice Shah dissents ; the point is scarcely one for the application of the rule of 'stare decisis' and as the Chief Justice points out, the departure is not likely to entail any real or serious hardship. But we are disposed to agree with Shah, J., that the vicissitudes of the 'hyphen' in the expression 'joint family' in that article cannot be safely regarded as a basis to rest one's conclusion upon. The expression 'joint family property' is far too well known in Indian law to be capable of misapplication but the earlier Bombay decisions have been swayed to the other extreme by reason of the change from 'Hindu' to ' person' in the description of the plaintiff. And the extent to which the rule of *stare decisis* can carry the courts, once they start on a wrong track, is illustrated by the decision in *Fatma Boo* v. *Ghisan Boo* [4] where Scott C. J. and Batchelor, J. applied Art. 127 to a suit by a *daughter* of a deceased Mahomedan to recover

1. (1909) 14 C. W. N. at p. 820.
2. (1905) I. L. R. 28 M. 130 (P. C.)
3. (1870) 2 N. W. P. 379.
4. (1909) 11 Bom. L. R. 1083

her share in his property. We must however say that the question of the applicability of the Article to any one who is not a Hindu is attended with very great doubt and difficulty. On the reasoning advanced by Beaman, J. in *Jan Mohomed* v. *Datu Jaffer* [1] and *Advocate General of Bombay* v. *Jimbabai* [2] it would not be proper to apply that rule even to such classes amongst Mahomedans as have hitherto been assumed to be governed by the Hindu law in matters of succession and inheritance. Whether the article was meant to apply to any class of persons outside Hinduism as well as Mahomedanism, it is even more difficult to say. Under the ruling in *Abraham* v. *Abraham* [3] it would have been possible for other communities to adopt the Hindu Law rules and institutions. (*Cf. Tarachand* v. *Reeb Ram* [4] and *Jalbai* v. *Louis* [5]) but after the enactment of a general territorial law in the Indian Succession Act, the matter has assumed a different aspect. Vide an article in 17 M. L. J. 489. See also *Nepen Bala* v. *Siti Kanta* [6] *Kunhichekkan* v. *Lydia* [7]. In so far however as Beaman, J. and those of his way of thinking lay down that in the case of communities that have been converted from one religion to another, the proof of retention of *certain* customs inconsistent with the law of the new religion does not justify the inference of a retention of the older law on other points as well, we would venture to point out that in view of the history of conversions in India, the presumption of a general adoption of the law of the new religion can be but very slight in this country and undue stress ought not to be laid on the plea of a particular custom being in *derogation* of the *general* law. In the words of Srinivasa Iyengar, J. in *Shaik* v. *Muhammad* [8] the question, in many of these cases is "as to what is the law and not as to what is the usage at variance with law."

Bai Raman *v.* Jagjivandas: I. L. R. 41 B. 618.

The point for decision in this case arose out of the difference made by the Mayukha between what have been termed 'technical' and 'non-technical' stridhana, in the matter of devolution. In the case of the latter, the sons, etc., (*Putradaya*) succeed in preference to daughters. This led to the question whether in the case of a woman who leaves a son and a grandson by a predeceased

1. (1913) I. L. R. 38 B. 449.
2. (1915) I. L. R. 41 B. 181.
3. 9 M. I. A. 195.
4. (1866) 3 M. H. C. R 50.
5. (1894) I. L. R. 19 B 680.
6. (1910) 15 C. W. N. 158
7. (1912) 11 M. L. T 232.
8. (1915) I L R 39 M. 664.

son, the son excludes the grandson or the two take together. Stress was laid in the course of the argument on what may be called the 'generic' sense in which the Mitakshara uses the word 'Putra,' as including son, grandson and great-grandson; but this would not of itself result in members of different degrees taking *together*, cf. for instance, cases of collateral inheritance like that dealt with by the Judicial Committee in *Buddha Singh* v. *Laltu Singh* [1]. The claim on behalf of the grandson was therefore mainly rested on the analogy of succession to the father's separate property, but this is distinguished by the learned Judges as resting on the doctrine of 'religious efficacy' which, according to them, may govern inheritance to the father's estate but not to the mother's estate. It is difficult to see how the 'religious benefit' theory is recognisable for one purpose but not for the other. The judgment in *Marudayi* v. *Doraisami* [2], shows the difficulty which the learned Judges who decided that case felt as to the correct basis on which to rest their conclusion in favour of applying the doctrine of 'representation' even in the case of succession to the father's separate property. It may perhaps be urged with some force that according to the Mitakshara theory, the inheritance from father to son is 'unobstructed' even in the case of 'separate' property but it can never be so in the case of the mother's property.

Kurgodigouda v. Ningangouda: I. L. R. 41 B. 625.

This case holds that an application for *restitution* is virtually one for execution within the meaning of the Limitation Act. This is perhaps the best that Courts can do to advance substantial justice, when the Legislature has not thought fit to make clearer the provisions on the point. The view here taken by the Bombay High Court accords with what has been laid down by the Madras High Court as early as in 1897 (see *Venkayya* v. *Raghavulu* [3]) See also *Unnamalai* v. *Mathan* [4]. But one cannot fail to see that there is some anomaly in holding that a minor cannot have the benefit of S. 6 of the Limitation Act in the matter of *preferring an appeal* but can avail himself of it in realising the fruits of an appeal on his behalf (or may be, by his predecessor in title). It may also be added that the Calcutta High Court is inclined to a different view though no case there has discussed the point at any length.

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1. (1915) I. L. R. 37 A. 604
2. (1907) I. L. R. 30 M. 348.
3. (1897) I. L. R. 20 M. 448.
4. (1917) 33 M. L. J. 418.

Kawal Nain v. Budh Singh : I. L. R., 39 A. 496 P. C

In *Suraj Narain* v. *Iqbal Narain* [1] the Privy Council held that "a definite and unambiguous indication by one member of intention to separate himself and to enjoy his share in severalty may amount to separation. But to have this effect the intention must be unequivocal and clearly expressed." In *Girjabai* v. *Sadhashiv Dhundiraj* [2] their Lordships further elaborated this view fortifying it with arguments drawn from the original authorities. There they say that "separation from the joint family involving the severance of the joint status so far as the separating member is concerned is quite distinct from the *de facto* division into specific shares, &c. One is a matter of individual decision," ; in another place they call it "matter of individual volition." The effect of such a declaration is stated to be a separation and a division in estate from his co-parceners. In the present case, their Lordships followed the last case. "The claim amounted" their Lordships say "to an intimation to the defendants his co-sharers of an unequivocal desire of the plaintiff for a separation from the family" and their Lordships take *Girjabai* v. *Sadhashiv Dhundiraj* [2] as rendering it beyond question that the commencement of the suit for partition effected a separation from the joint family and this irrespective of "whether he obtains a consequential judgment or not". In *Girja Bai* v. *Sadhashiv Dhundiraj* [2] their Lordships approve the statement of the law made by Kemp and Glover, JJ. in *Vata Koer* v. *Rowstem Singh* [3] which is to this effect: "Sohun did publicly and unequivocally by petition presented in court declare his intention to become from that date divided in estate. Such an intention amounts to a valid separation * * * * The acts and declarations of S. showing an unmistakable intention to hold and enjoy his own estate separately constitute a complete severance or partition." It seems to be clear from these citations that a declaration of intention to be divided in status operates to sever the particular member from that date, leaving the status of the other members unaffected. What is not clear is whether a public or unequivocal declaration will suffice to sever the status or whether there should be a further and formal communication. The approval by their Lordships of the statement of Kemp and Glover, JJ. would seem to show that such formal communication

1. (1912) I. L. R. 35 A. 80. 2. (1916) I. L. R. 43 C. 1031.
3. (1867) I. L. R. 8 W. R. 82.

is not necessary. This view is supported by the non-mention of service of notice as a relevant factor in this case. The inclination of their Lordships' opinion would also seem to be judging from their reference to a communication as one "to the managing member", that a communication to the managing member alone is sufficient. That the status of the other members would not be affected is clear also from the judgment of the Privy Council in *Sivagnana Tevar* v. *Periasami* [1]. From the case in *Girja Bai* v. *Sadhashiv Dhundiraj* [2] one further point that can be said to be inferentially established is that a notice to the other members showing such an intention does not require regis ration for the notice relied on in the case was not registered. In *Girja Bai* v. *Sadhasiv Dhundiraj* [3] their Lordships further observe that "if it were so, *i. e.* (if mere declaration be not sufficient) as they were minors, partition would be impossible until they had all attained majority." This observation clearly shows, we think, that such declarations on behalf of minors are wholly ineffective to sever the status. This is in accordance with their Lordships' view in *Balkrishen Das* v. *Ram Narain Sahu* [4] that there cannot be *an agreement to reunite* by or on behalf of a minor, that being a matter purely personal and affecting the status and beyond the competence of the guardian.

Lachhman Prasad *v.* Sarnam Singh: I. L. R. 39 All. 500 P. C.

In this case their Lordships hold that in the absence of special equities, a decree cannot be given even against the share of the mortgagor, (the case was one under Benares Hindu Law), when the mortgage is found not to be for the benefit of the family or for an antecedent debt. Their Lordships dissent from the view taken in 20 W R 192 that from the mere fact of a mortgage being given, a representation may be implied by the mortgagor that he had power to charge the family property and would make good the representation by partition or otherwise so that effect could be given to such representation by directing a partition. With the greatest respect to their Lordships, under S. 65 Cl *(a)* Transfer of Property Act a covenant is implied that the mortgagor has power

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1. (1878) I. L. R. 1 Mad. 312. 2. (1916) I. L. R. 43 C. 1031.
3. (1916) I. L. R. 43 C. 1031 at 1046. 4. (1903) I. L. R. 30 Cal. 738. (P. C.)

to transfer the interest which he purports to transfer though it may be that the latter half cannot be implied. From the observation of Lord Haldane made during the course of the argument, it would appear, that if a representation as to their powers had been made or implied the result would have been different. Would the mortgagee have been entitled to the share of the vendor if there was a partition before he brought the suit on his mortgage? Apparently not; for S. 43, T. P. A. is "where a person erroneously represents that he is authorised to transfer certain immoveable property and professes to transfer such property" and on the reasoning of their Lordships no such representation could be implied.

Puran Mal v. Birji Lal: I. L. R. 39 All. 651.

It was held in this case that an action for partition of the right of management of a public temple will not lie. As pointed out in *Ramanathan Chetty* v. *Murugappa Chetty* [1] the appropriate action by the members of the family in such a case is really one for a scheme of management. Having regard to the alteration of language in S. 92, C. P. C. it would seem to be impossible to bring such an action in respect of a public charity without the sanction of the Advocate General or the Collector as contemplated by that section but this would not affect the right of the parties by agreement *inter se* to settle such a scheme, *Ramanathan Chetty* v. *Murugappa Chetty* [1]. In view of the recent judgment of the Privy Council in *Sethuramaswamiar* v. *Sri Meruswamiar* [2], a broader question might arise if in the case of public charities, the right of management where it is hereditary, will descend to all the heirs or only one of them. Their Lordships say in that case that the ordinary rule of inheritance assumed to apply in the former case applies only to private charities, but it was overlooked that in that case the institution was a public one. The point cannot however be regarded as finally decided for the case really turned on the words of the grant which their Lordships take as conferring the trusteeship on the holder of the office for the time being and not on the grantee in his personal capacity. Expediency is certainly in favour of a single heir.

1. (1902) I. L. R. 27 M. 192. 2. (1905) I. L. R. 29 M. 283 P. C.

Subrahmanya Ayyar v. Raja Rajeshwara Dorai: I. L. R. 40 M. 1016.

The point is covered by *Narayana Pattar* v. *Gopalakrishna Pattar* [1] and *Sheik Budan* v. *Ramachandra Bhujangaya* [2] and the decision of the Privy Council in *Raghunath Das* v. *Sunder Das* [3]. In the last case notice was issued to the Official Assignee why he should not be substituted for the judgment-debtor. The Official Assignee did not put in appearance and the property was ordered to be sold; their Lordships held that this did not estop him from contending that the sale conveyed no title. In the first case, an application was made for restitution claiming 12 per cent. interest but the notice did not apprise the respondents of this fact. Their Lordships held that an order for arrest on the non-appearance of the respondents did not involve a binding adjudication as to interest.

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1. (1904) I. L. R. 28 M. 355.
2. (1887) I. L. R. 11 B. 537
3. (1914) I. L. R. 42 C. 72.

Shashi Bhushan Bose v Manindra Chandra, I. L. R. 44 C. 890.

This case lays down that an administration action by a creditor must be regarded as a suit for accounts within the meaning of the Court Fees Act. The learned Judges go on to add that when other creditors come in under the administration decree, they may be called upon to pay court-fees under S. 11 of the Act and that the amount of their claim may entail the removal of the proceeding to a higher court. On all these points, their views seem to us, with all respect, open to question. The rules relating to such actions can so far at any rate as Courts in the mofussil are concerned, hardly be regarded as familiar or well settled even to-day. At the time the Court Fees Act was passed, administration proceedings seem to have been quite uncommon, if not unknown, outside the Presidency Towns. In England too many points of practice relating to such proceedings rest not so much upon reason or even considerations of convenience as upon long established usage. To take a well-known illustration in respect of the very frame of the action, the rule that an administration action by a creditor must purport to be on behalf of all the creditors is based on nothing but practice. In *Wooldridge* v. *Norris* [1] Giffard V. C. thought this a matter of not much moment, for, he said, 'whether the bill be or be not in terms filed on behalf of all the creditors, the decree is in the same form' (cf also per Hall, V. C. in *Cooper* v. *Blisset* [2]) but in *Worraker* v. *Pryer* [3], Jessel, M. R. thought otherwise and held an amendment of the form necessary. And even in England, a creditor may sue for himself alone if he is content to proceed against the personal estate of his debtor. Take again the rule, applied by the Madras High Court in *Malakondiah* v. *Lakshmi Narasimhalu* [4] that even where the suit purports to be on behalf of *all* the creditors, the defendants may get it dismissed by paying the debt due to the particular plaintiff and the costs of the action. It is not easy to reconcile this with the assumed 'representative' character of the action? This form of action first obtained statutory recognition in India by S. 213 of the Procedure Code of 1877, which provided for a preliminary 'order' for accounts and inquiries and for other directions, enacted the applicability of the rules of the Insolvency law where the deceased's estate under

1. (1868) L. R. 6 Eq. 410 at p. 414. 2. (1875) L. R. 1 Ch. D. 691.
3. (1876) L. R. 2 Ch. D. 109. 4. (1914) 26 M. L. J. 812.

administration was found to be insufficient to pay up its debts and liabilities in full and added that 'all persons who in any such case would be entitled to be paid out of such property may come in under the decree for its administration and make such claims against the same as they may respectively be entitled to by virtue of this Code.' The Fourth Schedule prescribed certain forms of plaints and decrees for use in these proceedings (See Nos. 105 to 107 and 130-131). Beyond this the statute law threw little light on the subject and matters have continued practically in the same state up to this day, the later Codes virtually reproducing the above provisions of the Code of 1877. In the earlier Codes there was nothing to indicate that a creditor's action must be on behalf of all the creditors but that is expressly shown in Form No. 41 of App. A. to the Code of 1908. The relief to be prayed for is not *payment* of the plaintiff's debt but an account of the estate of the deceased and the administration of the same by the Court. Payment is ultimately obtained only as part of the process of administration and no difference exists, in this respect, between the plaintiff and the other creditors of the estate.

Indian case law on the subject has been very meagre and little light is desirable therefrom as to how the provisions of the law relating to Court-fees and Suits valuation are to be applied to this class of proceedings. If there is to be any rational connection between the value of the property involved and the jurisdiction of the Court entitled to deal with the case, it is the value of the *whole* estate and not the claim of the particular creditor or legatee that ought to be the test. Looking at the question from another point of view, the suit by a creditor is deemed to be really on behalf of all the creditors and if so, the totality of their claims and not the single debt of the particular creditor who comes forward as plaintiff, should be the criterion for the valuation of the suit. But there is great force in the remark of the learned Judges in the present case that these are matters to be ascertained by the Court on accounts and inquiries in the suit itself and it will be unreasonable to ask the plaintiff to state them, whether approximately or otherwise, before trial. The question must therefore be decided on some other principle. It is at least desirable that the Court should be a Court of plenary jurisdiction and this was evidently the reason of the old explanation (since repealed) to S. 265 of the Contract Act *re* the winding up of partnerships. In

the absence of any statutory-provision on the point or of rules framed under S. 9 of the Suits Valuation Act and by holding that such proceedings are suits 'for accounts' within the meaning of S. 7 Cl. IV (*f*) of the Court Fees Act, the choice of the forum is left to the arbitrary decision of the nominal plaintiff; and the anomaly of throwing upon an inferior court the task of administering a valuable estate and of *finally* deciding the claims of its creditors, where the amounts in question may be far in excess of the Court's pecuniary jurisdiction is sought to be avoided by assuming that the forum may be changed at an intermediate stage of the proceedings. The arguments against this last assumption are forcibly stated in the referring judgment in *Kannayya Chetti* v. *Venkata Narasayya* [1].

As regards Court-fees, there can be no justification for asking the plaintiff to pay an *advalorem* fee on the estimated value of the estate or the estimated amount of the debts—even assuming such estimation to be possible. But, on the other hand, it seems to us scarcely right to regard such a proceeding as merely a suit for accounts. It is no doubt a suit for accounts, but essentially it is much more too; the administration of the estate is the main purpose of the proceeding and the taking of accounts is, if anything, but preliminary or incidental thereto. Looking also at the reason of the rule, the provisions in S. 7 (IV) and S. 11 of the Court Fees Act, in respect of suits for accounts, are based on the assumption that till the accounts are taken the plaintiff cannot give the *exact* value of his claim; but there is no warrant for such an assumption in the case of the creditor bringing an administration action, for there is no uncertainty as to the amount of his claim. The uncertainty, if any, is as to how much of it he may be able to *realise* from his debtor's estate, but that has no bearing on the question of the court-fee payable and indeed such uncertainty is the portion of many a creditor who files an ordinary suit for money. The action in question really constitutes a special category by itself and in the absence of express statutory provision relating to it, must only be held to fall under cl. vi of Art 17 of the Second Schedule to the Court Fees Act. We are further unable to agree that the analogy of S. 11 can be invoked in such a case, at any rate, so far as creditors are concerned. The section

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1. (1916) I. L. R. 40 M. 1.

certainly does not in terms apply to the payment of their debts in course of administration and it seems to us that in the working of a fiscal enactment there is no place for any theory of 'extension by analogy'. The true analogy, if any, is to be found in the practice relating to insolvency proceedings.

With reference to *Khatija* v. *Shekh Adam* [1] where the claim was for the plaintiff's share of an ancestor's estate, the first observation we would make is that on the decision that the case fell under S. 7 (iv) (f) of the Court Fees Act, we cannot understand how the learned Judges allowed the double valuation, one for the purposes of Court-fees and the other for purposes of jurisdiction, to remain. We would also point out that in that case, the value of the plaintiff's share really depended upon the result of the accounts to be taken and S. 11 of the Court Fees Act may well be held to apply to any decree that may be passed in favour of the plaintiff there. The Judgment contains very little that may be said to bear generally on administration suits.

Malchand *v.* **Gopal Chandra Ghosal**: I. L. R. 44 C. 899.

The question raised in this case related to the power of the Court, under S. 21 of the Presidency Towns Insolvency Act, to annul an order of adjudication obtained by an insolvent. The material facts were that an earlier adjudication had been annulled under S. 41 on the ground of the failure of the insolvent to apply for an order of discharge within the prescribed time and within a few days of this annulment, the debtor applied for and obtained a fresh adjudication. It is this new order of adjudication that certain creditors applied to have annulled and it was argued on their behalf that the fresh application was an abuse of the process of the Court and it was therefore a case where the debtor 'ought not to have been adjudged insolvent'. The learned judges accepted this contention, relying mainly on certain English Cases under Ss. 8 and 35 of the Bankruptcy Act of 1883 and the decisions in *Samirudin* v. *Kadumoyi Dasi* [2], *Ponnusami* v. *Narasimha* [3] and *Triloko Nath* v. *Budri Das* [4]. They held it to be "well settled that notwithstanding proof of the existence of the conditions mentioned in the statute, the Court is

1. (1915) I. L. R. 39 B. 545.
2. (1910) 12 C. L. J. 445.
3. (1913) 25 M. L. J. 545.
4. (1914) I. L. R. 36 A. 250.

not bound to pass an order of adjudication where the application constitutes an abuse of the process of the Court." The Indian cases assume rather than decide this point. But apart from that we cannot help thinking that the rule as thus assumed is inconsistent with the decision of the Judicial Committee, pronounced some days after the judgment under notice, in *Chhatrápat Singh* v. *Kharag Singh* [1]. All the authorities referred to in the present case seem to have been cited before their Lordships and yet they hold that the Act ' entitles a debtor to an order of adjudication when its conditions are satisfied. This does not depend on the Court's discretion but is a statutory right and a debtor who brings himself properly within the terms of the Act is not to be deprived of that right on so treacherous a ground of decision as an 'abuse of the process of the Court' ". The question there no doubt turned on the Provincial Insolvency Act but there appears to be no material difference between the two Acts on the present point. It may be said that the word ' may' in S. 15 of the Presidency Towns Act imports a discretion not allowed by the language of S. 16 of the Provincial Act, but as against this it must be remembered that the former Act makes an express exception only for cases where in the opinion of the Court ' the petition ought to have been presented before some other court having insolvency jurisdiction ' and the provision as to ' other sufficient cause' inserted in S. 13 (dealing with creditor's petition) is not repeated in S. 15 which deals with the debtor's petition. It may also be noted, on the other hand, that the English Cases allowed a ' discretion ' to the Court in spite of the word ' shall' in S. 8 of the English Act of 1883. We may also point out, in passing, that in Chhatrapat Singh's Case, a prior application by the insolvent had been refused by Woodroffe, J. and also on appeal but no point is made by their Lordships, either of this fact or of any change of circumstances between that and the later application

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Ghuznavi v. The Allahabad Bank Ltd. I. L. R. 44 C. 929 (F. B.)

We may now take it as settled, for all the High Courts in India, that the power of an Appellate Court to remand a case is not *confined* to the particular instances specified in O. 41 R. 23

1. (1916) I. L. R. 44 C. 585.

C. P. C; it may also be taken as fairly well recognised that in cases not falling under O. 41 R. 23, the power to remand should be only very sparingly and cautiously used, *i. e.*, when the case is not covered by any other provision and in the words of S. 151 of the Code, it may be necessary for the ends of Justice to remand the case. There are one or two connected questions on which there still remain some uncertainty and conflict of case law. One such is that relating to the maintainability of an appeal against an order of remand not falling under O. 41 R. 23. Some decisions have held that no appeal lies in such a case as O. 43 R. 1 (*u*) is in terms limited to remands under O. 41 R. 23; but in may instances thy High Courts have on appeal set aside orders of remand on the very ground that they were not justified in the circumstances of the case (cf. *Narottam* v. *Mohan Lal* [1] *Mani Mohan* v. *Ramtaran* [2].) There is much to be said in favour of the view that the question of the propriety of the order of remand should not, as much in the one class of cases as in the other, be allowed to remain in suspense till the case may finally come up on second appeal and be then dealt with under the first clause of S. 105, but the language of O. 43 R. 1 (*u*) is a real difficulty in the way of upholding a general right of appeal.

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1. (1912) I. L. R. 37 B. 289. 2. (1915) I. L. R. 43 C. 148.

Divi Punniah *v.* **Gorantla Kotamma**: I. L. R. 40 M. 939.

The point of distinction between a service or personal inam and a charitable inam is that while in the former, the holder has a beneficial interest, in the latter he has not. If therefore by reason of the resumption any benefit accrues to any of the trustees, there was nothing before to which the new benefit could be regarded as a graft so as to justify the co-trustee to claim. If the trustees owned the land between themselves and the assessment alone belonged to the charity then the resumption of course could not affect their antecedent title. Either way, resumption could not be the source of any new title or right. But as pointed out by Sir Bhashyam Aiyangar, J., where the trusteeship is hereditary in a particular family, the effect of resumption as carried out is ordinarily to confer the title to the land on the family even though the inam consisted of the land as well as the assessment.

Natesa Pillai *v.* **Ganapathia Pillai**: I. L. R. 40 M. 949.

Seeing that in this country the real difficulties of the suitor commence after decree, there is no reason why the Court should show any special tenderness to the judgment-debtor whose default is at the bottom of the whole trouble. His interests are safe-guarded by provision for deposit of the amount decreed and the clause introduced in the new Code providing for the judgment-debtor abandoning possession if he so chooses, and in partition decrees, making the division compulsory before the final decree.

We think under the circumstances the tendency of the Courts to regard all but applications which are "so defective that a court cannot pass orders thereon in execution" as applications in accordance with law is fully justified. The self-interest of parties can be counted on to bring the execution to speedy termination. The suggestion of Mr. Justice Seshagiri Aiyar is that non-compliance with statutory essentials on requisition should render the original applications nugatory. The clear implication of O. 21 R. 17 (2) "Where an application is amended under the provisions of sub. R. 1 it shall be deemed to have been an application in accordance with law and presented on the date on which it is presented" would seem to be that in respect of the amendments required by reason of R. 11 to 14. The question ordinarily is what requirements are to be regarded as essentials in the sense of rendering the application *no application*

at all in their absence and what not. The words "in accordance with law" connote a certain amount of irregularity, some "latitude in the observance of the law." They imply that the law is followed not "verbatim et literatim but substantially." See *Thomas* v. *Kelly* 1. The subsequent amendment or failure to amend has in such cases no bearing on the determination of the question of limitation.

Perumal Pillai v. Raman Chettiar : I. L. R. 40 M. 968 F. B.

We must confess we are not at all satisfied that the sections of the Transfer of Property are as conclusive as are supposed in this case. In the first place, there is no section in the act authorising the mortgagee to release any portion of the property and nevertheless sue for the entire amount of the mortgage.

In the second place there is no section that lays down that such a release will not affect the right of the mortgagors *inter se.* S. 82 applies to the normal case.

The words "contract to the contrary" have given rise to a whole literature, S. 44 of the Contract Act states the effect of release on joint debtors or contractors and does not relate to property jointly rendered liable. The section may have a bearing where the case is one of joint mortgagors and the interest of one is released from the mortgage, but it cannot have a bearing where the mortgagor is originally one and the equity of redemption subsequently passes to several people. Is not indivisibility of the mortgage a safer rule to rely upon—leading to adjudication once for all as to the amounts due on the mortgage? The answer to the reference given in this case is not, we think, the only answer possible.

Re Dudekula Lal Sahib : I. L. R. 40 M. 976.

We prefer the opinion of the majority in this case; otherwise all the elaborate distinction between discharge and acquittal is, we think, a superfluity. It could never have been contemplated by the legislature that these petty cases where it thought fit to convert dismissals or discharges into acquittals should be liable to be reopened on a fresh complaint. If the language was perfectly clear that was another question; we are happy to think that it is not.

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1. (1888) L. R. 13 A. C 506.

Vaithilinga v. Ayyathorai : I. L. R. 40 M. 1118.

The Caste Disabilities Act, S. 1 provides that so much of any law or usage in force * * as inflicts on any person forfeiture of rights of property or may be held in any way to impair or affect any right of inheritance by reason of his or her renouncing or having been excluded from the communion of any religion or being deprived of caste, shall cease to be enforced as law. " From the language of the section two things seem to be perfectly clear. In the first place the section only preserves rights and does not create them ; secondly, it applies only to persons that once belonged to a *caste* or *religion* and subsequently withdrew themselves therefrom. Applying these two tests, the descendants of a man born subsequently to his changing caste cannot possibly come within the Act. We think *Bhagwant* v. *Kallu* [1] was rightly dissented from.

Ramanathan v. Ranganathan : I. L. R. 40 M. 1134.

In all legal history, two tendencies are perceptible, one the strictly formal, once represented in English Law, by the Common Law, the other appealing to justice and equity, represented in the English Law, by Equity. At some periods, the tendency is towards the one, at others towards the other. It is largely a matter of temperament. The Statute of Frauds was got round in a manner which has been alternatively the subject of criticism and approval. The tendency in recent years has been to restrict interference with the positive injunctions of statutes on grounds of Equity and Justice, to a minimum. The two judgments delivered by Lord Shaw are supposed to set the current the other way, that is the view of two of the Judges that had to deal with this case while the majority are of the contrary opinion. We must confess to a sense of perplexity. On the one hand, we do not see necessity for the elaborate exposition of the doctrine of actings and part-performance undertaken by Lord Shaw if it was not intended to have a wider application than is supposed by the majority ; on the other, we have the fact that his Lordship takes special care to point out in each case that the statute does not require writing. With respect we cannot agree with the opinion of Mr. Justice Sadasiva Aiyar that in the *Repudi case, Mulraj Lakshmi*

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1. (1889) I. L. R. 11 All. 100.

Venkayyamma v. *Venkata Narasimha* [1] the transaction was one that required writing under the Transfer of Property Act; the alienation was one for consideration, but not for price, i.e., money or money's worth and as such was not a *sale*.

We cannot quite see how any question of Estoppel could arise in the case. There was an exchange ineffective in law to pass title. Defendant knew or must be supposed to have known it. He effects improvements nevertheless. He was no doubt not dissuaded therefrom by the plaintiff; but that could not affect the question, the defendant being aware of the exact state of title. Estoppel can come in only when the party was not aware of the true state of facts. The instances put are of implied *grant*, implied from the facts having regard to the justice of the case. The doctrine of lost grant is the result of similar line of argument. There is no scope for the application of the doctrine that equity takes that as done which ought to be done for in the case in hand, the law says, that it can be done in a particular way and in none other. If the law did not exclude other modes of transfer, then it might be permissible to have recourse to the equity doctrine. It is to be regretted that the elaborate precautions taken in this country for security of title to real property by public registration should be defeated by the English equity doctrines which however satisfactory from points of view of abstract justice are far from making for security of title. There is not even the protection afforded by Courts of Equity to *bona fide* purchasers without notice. In cases, where when the suit is brought, a suit for specific performance is not barred, we think the legislature may well intervene and provide for relief being given to the defendant in possession; for insisting on a separate suit seems to be an idle formality. Appeal to the word trust used in the last chapter of the Trust Act, we do not think is of any assistance as that would not preclude the plea of limitation or confer rights not conferred on a party in the ordinary case of specific performance.

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1. (1916) L.R. 43 I.A. 138.

Shyam Mandal v. Satinath Banerjee I. L. R. 44 C. 954.

Some portions of the judgment in this case deal with points fairly well settled such as, that where an appeal is dismissed for default there is no *decree* of the appellate Court to execute but only that of the lower Court; and again that a notice under Or. 21 R. 22 C. P. C. is a necessary preliminary to give jurisdiction to the executing court in cases falling under that rule. There are however two points of interest considered by the learned Judges; one is, as to the status which a tenant sued in ejectment under S. 155 of the Bengal Tenancy Act occupies during the period between the institution of the suit and the passing or execution of the decree and the other relates to the power of the court under that section to grant an extension of time for payment of compensation in lieu of ejectment when application is made *after the expiry* of the time originally fixed. Both these questions have a bearing upon proceedings under the corresponding provision S. 151 of the Madras Estates Land Act which authorises the ejectment of an occupancy ryot on the ground that he has materially impaired the value of the holding for agricultural purposes. On the assumption that the right to eject is based on a theory of forfeiture incurred, the learned Judges point out that the power conferred on the court to relieve against forfeiture prevents the extinction of the tenant's interest till even the benefit of such relief is lost. A simpler way of dealing with the situation is suggested by Mr. Justice Sadasiva Aiyar in *Subramanian Chettiar* v. *Periasami Thevar* [1], where he points out that the case is not really one of a determination of the tenancy by the landholder analogous to forfeiture under the ordinary law of landlord and tenant, that it is really a special statutory cause of action and that until the ryot is evicted under the order of the Collector he does not cease to be a ryot. On the point as to the extension of time, the language of S. 152 of the Madras Act is slightly different from the Bengal provision, but we do not see that the difference is such as to preclude the applicability of the conclusion arrived at in the case under notice, *viz.*, that the court has the power to extend time even when moved after the expiry of the period originally fixed. The principle of the decision in *Vallabha Valiya Raja* v. *Vedapuratti* [2]—, where, with reference to redemption suits, a different

1. (1914) 26 M. L. J. 435. 2. (1895) I. L. R. 19 M. 40.

rule was laid down—has not been looked upon with much favour in later cases and need not be applied to cases in which the party asking for extension is a defendant.

A further question touched on in the judgment calls for a few remarks. After a decree in ejectment had been passed by the Court of first instance, the land-holder had sued for rent for a period including that of the pendency of the ejectment suit. With reference to this it was argued that the decree for ejectment had become incapable of execution on the analogy of the rule as to waiver of forfeiture by receipt of subsequent rent. The learned Judges say, "there might have been no escape from an inference that there had been such waiver if there had been no provision for relief against forfeiture." We are with all respect unable to see the necessity for such an inference. If the analogy of the ordinary law of landlord and tenant holds good at all, a receipt of rent *after the institution* of a suit in ejectment cannot constitute a waiver (see the 2nd proviso to S. 112 of the Transfer of Property Act) and the learned Judges themselves recognise this. Much less then can a waiver arise from acceptance of rent after a decree in ejectment, provided of course, it is not for a period subsequent to the date when the ejectment decree was to take effect, so as to give rise to an implication of a *new* tenancy. *Nobo Kishen* v. *Hurish Chunder* [1] seems, so far as one can gather from the very meagre report, to be a case of the last mentioned class. The principle of the decision in *Forbes* v. *Maharaj Bahadur Singh* [2] appears to us altogether different. Where by the law a particular right was attached to a particular status their Lordships say that the right cannot be availed of by a person who has ceased to hold that status.

Brajendra Kishore *v.* Hindustan Co-operative Society Ltd., I. L. R. 44 C. 978.

The question of the effect under S. 20 of the Limitation Act of payment by the principal debtor on the running of time as against the surety is now covered by more than one Indian decision and at least three of the High Courts have held that the surety is not affected by such payments. The practical result of this would seem to be that a creditor, if he does not wish to hurry into Court because of regular payment of interest by the principal

1. (1867) 7 W. R. 142.
2. (1914) I. L. R. 41 C. 926.

debtor, will nevertheless run the risk of losing his remedy against the surety unless he goes on taking acknowledgments from him from time to time. In the ordinary course it is the principal debtor and not the surety that is likely to make part payments or payments of interest and it will be too much to treat him as the agent of the surety in the matter of making such payments. It is scarcely reasonable to expect the surety formally to join in making such payments and we do not know if even such joining would be of any use; for, the payment being single, cannot be treated as a payment towards what are held to be two *distinct* liabilities. We still think with Lord Justice Fry, (*Allison* v. *Frisby* [1]), that, "it would be contrary to good sense and the common understanding of mankind" to hold that even while the principal debtor keeps paying the interest regularly, "the statute should run in favour of the surety." But so far as India is concerned the matter would now seem to be one for the Legislature to set right.

Thakurdas Motilal *v.* **Joseph Iskender**: I. L. R. 44 C. 1072.

The general principle laid down in this case that O. 21 R. 52, Civil Procedure Code does not allow of her *anticipatory* attachment of money expected to reach the hands of a public officer is one now accepted by all the Courts in India. But we do not feel quite certain if in applying that rule the Court need go so far as the learned Judges have done in this case in laying stress on the distinction between the different capacities of the person who first held the money in one capacity and afterwards transferred it to himself in another capacity.

The other point in the case related to the rights *inter se* of several attaching creditors in respect of a fund in Court. No exception can be taken to the view taken by the learned Judges that mere priority of attachment gives no right to preferential treatment and that where the fund is insufficient to meet the claims of all the attaching creditors, it should on general principles be rateably distributed amongst them. Needless to say such a case ought to be clearly distinguished from a rateable distribution under S. 73 of the Code with its special conditions. The latter distribution is made by an *executing* Court as amongst persons

1. (1889) L. R. 43 Ch. D. 106.

who have duly *applied to it for execution* within a certain time and it is further restricted to what may be described as 'assets' received by the Court, whereas the rateable distribution of the kind now in question is subject to no such limitation. Where creditors of both kinds are before the Court, and the fund in question is of the kind dealt with in S. 73, the law allows its distribution only as amongst the executing creditors as distinguished from the mere attaching creditors and if there is only one executing creditor he would be entitled to full payment in preference to the attaching creditors, or creditors who have not applied for execution within the time prescribed in S. 73. This is only in accordance with the principle that while judgment creditors do not by the attachment alone acquire any special interest in the property attached, they do acquire special rights in the funds *realised* as the result of execution proceedings taken by them. This distinction is clearly marked in the results arising out of the judgment-debtor's insolvency; for, while mere attachment, secures no rights as against the Official Assignee, the law allows the decree-holder the benefit of his execution proceedings 'in respect of assets realised in the course of the execution * * before the date of the order of adjudication' (S. 34 of the Provincial Insolvency Act and S. 53 of the Presidency Town's Insolvency Act). As for the decision in *Tiruvengadiah* v. *Tiruvengadiah* [1] it may perhaps be justified on the facts *viz.*, that there was only one attaching creditor, the attachment by the other having been held to be invalid, but the judgment can scarcely be regarded as authoritative if it meant to lay down a general rule of preference arising out of mere priority of attachment.

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1. (1913) 26 M. L. J. 364.

Jhambhu *v.* **Kutramani** : I. L. R. 39 All. 696.

The ground of decision of Tudball J seems to be opposed to the judgment of the Madras High Court in *Subbayya* v. *Madduletiah* [1] for in that case it was held that a document which is inadmissible for want of registration cannot be admitted to prove the adverse nature of the possession but as put by Mr. Justice Walsh, the document can be used to prove the antecedent agreement (see *Nagappa* v. *Devi* [2]) and if possession continues for over the statutory period in accordance therewith, the court may well hold the party to the bargain on the principle of the decision of the Privy Council in *Mahomed Musa* v. *Aghore Kumar Ganguli* [3].

Emperor *v.* **Mathura Prasad** : I. L. R. 39 A. 715.

Mere statement of a suspicion as such to a police officer cannot be regarded as a charge and the view taken in this case is in accordance with that taken by the Madras High Court. See *In re Ganapathi Bhatta* [4].

Fakir Chand v. **Balu Lal** : I. L. R. 39 All. 719.

Nawab Azimut Ali Singh v. *Jowahir Khan* [5] is taken by *Girish Chunder Dey* v. *Juramoni* [6] to decide that the purchaser of a portion of the property comprised in a mortgage cannot redeem the whole property against the will of the mortgagee. The case is one of the mortgagee acquiring a portion of the Equity of redemption and as such within the exception recognised by S. 60 of the Transfer of Property Act and therefore no authority for the position taken up in *Girish Chunder Dey* v. *Juramoni* [6]. On the other hand, their Lordships of the Privy Council in *Narendra Narain Singh* v. *Dwarka Lal Mundu* [7] are perfectly clear that where there is a mortgage for one entire sum and the property though held in certain shares is mortgaged as a whole for the entire sum, each and every one of the mortgagors has a right by payment of the money to redeem the estate, seeking his contribution from the others. Their Lordships do not say that there

1. (1907) 17 M. L. J. 469
2. (1890) I. L. R. 14 M. 55.
3. (1914) I. L. R. 42 C. 801.
4. (1911) I. L. R. 36 M. 308.
5. (1870) 13 M. I. A. 415
6. (1900) 5 C. W. N. 88.
7. (1877) L. R. 5 I. A. 18=I. L. R. 3 C. 397.

may not be cases of mortgages of separate shares in which by proceedings properly framed, "foreclosure may take place in respect of some such shares only" presumably cases where though there is but one paper, in effect there are two mortgages.

Raja of Palghat *v.* **Raman Unni** : I. L. R. 41 M. 4.

The position of a Stani has been likened to that of a widow by the Privy Council, see *Venkateswara Iyan* v. *Sekhari Varma* [1] (see also *Mahomed* v. *Krishnan* [2]) and the same tribunal has definitely held in *Soni Ram* v. *Kanhaiya Lal* [3] a case relating to Art. 148 and not to Art. 141 (which was the article in question in *Runchor Das* v. *Parvatibai* [4]) that a reversioner does not claim through the widow but even so, the case being one of trust, (*Runchordas Vandravandas* v. *Parratibai* [4]) would apply and the claim of the plaintiff was rightly held to be barred. It can however, by no means be said that the authority of *Pydigantam Jagannadha Row* v. *Rama Doss Pantulu* [5] is unimpeached or unimpeachable specially having regard to the fact that offices are regarded in Hindu Law as *property* to which the rule against perpetual entail is held to apply (see *Gnanasambanda* v. *Velu Pandaram* [6]) and the claim by the reversioner is held to be distinct from that of the widow even in cases to which Art. 141 does not apply *Ranchor Das* v. *Parvatibai* [4].

Seetikutti *v.* **Kunhi Pathumma**: I. L. R. 40 M. 1040. (F. B.)

This case exhibits a most marked difference of opinion. The Chief Justice and Mr. Justice Coutts Trotter take one extreme view, Mr. Justice Srinivasa Aiyangar another, while Abdur Rahim and Seshagiri Aiyar, JJ., take an intermediate view. The question related to the application of Art. 134. This article has been very fruitful of litigation and may be counted on, partly thanks to the difference of opinion exhibited herein, to perplex the profession and the public for a considerable time to come.

1. (1881) I. L. R. 3 M. 384 at 386
2. (1887) I. L. R. 11 M. 106.
3. (1913) I L. R. 35 A. 227.
4. (1899) I. L. R. 23 B. 725.
5. (1904) I L. R. 28 M. 197.
6. (1899) I. L. R. 23 M. 271.

The two extreme views are (i) that the article applies to all cases where there has been a transfer by a mortgagee or trustee and the suit is one for possession; whether at the date of the transfer the mortgagor or *cestuique* trust is entitled to sue for possession or not and whether possession is transferred then or not (ii) that the article has no application where there is no transfer of possession (not necessarily actual) along with transfer and the mortgagor is not entitled to sue for possession at the date of the transfer. The intermediate view is that the article applies to all cases of transfer, but limitation commences only when possession is transferred. The first view will undoubtedly involve much hardship in practice; an illustration of it is given by Mr. Justice Srinivasa Aiyangar. It may be argued that the mortgagor might well bring a suit for a declaration but then there is no provision that a declaratory decree will stop the running of limitation. If after the decree the transferee gets possession and the application of the article is there by attracted, declaratory decree or no declaratory decree, the transferee would get a complete title. Where the transferee is entitled to immediate possession but does not get possession for 12 years it may be, his title may get extinguished and possession acquired thereafter by the transferee may not avail him, but the ordinary case would not be one of that sort. If limitation starts only on the taking of possession, and it is further conceded that the mortgagor is entitled to protect his right by suing for possession to be delivered back to the mortgagee there may be no hardship. The difficulty as to the latter part is how possession is to be delivered to the mortgagee who has parted with his right whatever it is, in favour of the transferee. We prefer the opinion of Mr. Justice Srinivasa Aiyangar. To start with, we have the authority of the Privy Council in *Radanath Doss* v. *Gisborne* [1] that the article inasmuch it cuts down the ordinary periods of limitation applicable to mortgagee's and *cestuique* trust's suit, must receive a strict construction. With all respect to the learned Chief Justice, we think we also have the authority of the Privy Council, in *Batul Begam* v. *Mansur Ali Khan* [2]. See *Rangiah Goundan & Co.* v. *Nanjappa Row* [3] and *Narayana* v. *Narayana* [4] for the position that in any case where the third column is inapplicable, the article also is inapplicable. The effect of construing the article literally has the effect of barring a

1. (1871) 14 M. I A. 1.
2. (1901) I. L. R. 24 A. 17.
3. (1903) I. L. R 26 M. 780.
4. (1889) I L. R. 13 M. 437 at 442.

person before he has a right to sue. It has also the effect of giving the defendant the benefit of a period when he is not in possession and the plaintiff could not sue to recover possession.

Pierce Leslie v. Perumal: I. L. R. 40 M. 1069.

Art. 182 of the Limitation Act provides that limitation "for the execution of a decree or order of any Civil Court etc." shall be 3 years from *inter alia* the date of applying in accordance with law to the proper court for execution or to take some step in aid of execution." In accordance with well known principles of interpretation, the limitation act cannot have extra territorial application, that is to say, the execution referred to therein can only be *prima facie* execution in a Court in *British India.* It may be a question whether the terms "execution" "Civil Court" "proper Court" should not be extended a little having regard to the *transfers* for *execution* recognised by the Civil Procedure Code, but in no view can the term execution be made to comprehend "execution" by a court in Travancore which is not recognised by the Civil Procedure as one of the Courts to which transfer for execution can take place. One other question discussed by the Full Bench is whether a notice issued by the Court to show cause why execution should not proceed preliminary to sending the decree for execution should not save limitation. The exact nature of the notice does not appear; if, however, it was an application under O. 21, R. 22 there is considerable body of authority in the Madras High Court which holds that such a notice if issued, or if not issued, an applicatian for such notice, will save limitation (*Pachiappa Achari* v. *Poojali Seenan* [1] *Varadaraja Mudali* v. *Murugesam Pillai* [2]) and we do not think these cases have been overruled by *Maharaja of Bobbili* v. *Narasarauj Bahadnr* [3].

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1. (1905) I. L. R. 28 M. 557
2. (1915) I. L. R. 39 M. 928
3. (1916) I L R. 39 M. 640. (P. C)

Patrachariar v. Srinivachariar: I. L. R. 40 M. 1152.

Having regard to the recent rulings of the Privy Council which enable a member of a Hindu family by his own declaration without the concurrence of the other members of the family to divide himself, a larger latitude should be permissible for natural guardians in assenting to dispositions by the other members so as to prevent the less beneficial eventuality of a complete separation and devolution away from the family. On principle, it is not easy to see how a will with consent is to be supported. The consent is obviously not intended to operate as a release. Nor is the will intended to operate as an immediate partition. It may be possible to look upon it as a sort of agreement to divide *in futuro, i. e.* to say at the death of the testator but that is not how it is understood. In that view the document may require registration. It may perhaps be looked upon as an election in advance not to question the will in return for the testator abstaining from exercising certain powers vested in him by law but this undoubtedly involves an extension of the doctrine of election as hitherto understood. But there is no reason why the rules of English law should be taken as the last word on these matters. So far as the power of the father to make a partition between the sons is concerned, he can exercise that power *inter vivos*. It has no necessary connection with his power of disposition and there is no reason on principle why he should not exercise it by his will. The Privy Council say, it should be with the assent of the sons. The question is one purely of authority and is not a matter for argument.

Khemraj Shrikrishnadas v. Kisanlala Surajmal: I. L. R. 42 B. 5.

The circumstances of the case being such as to preclude any question of *discretion*, the court had to decide the wider point *viz.*, whether the provisions of O. 41, R. 10, Civil Procedure Code, as to demanding security for costs from an appellant, can at all be held to apply to persons permitted to appeal in *forma pauperis*. On the maxim *generalia specialibus non derogant*, the learned Judges answer it in the negative and they support themselves by the decision in *Wille* v. *St. John* [1], which Macleod, J. had followed in *Bai Laxmi* v. *Hargivan* [2], with reference to

1. (1910) L. R. 1 Ch. 701. 2. (1911) I. L. R. 36 B. 415.

an order for security in the court of first instance. This was in effect, the view taken by Sir Richard Couch and Mr. Justice Dwarakanath Mitter in *Nusseroodeen* v. *Ujjul* [1], where they based their conclusion on the saving expression 'in so far as they are applicable' in S. 367 of the code of 1859; but that case was dissented from in *Sesha Iyangar* v. *Jainulavadin* [2], (referred to with approval in *Srinivasa* v. *Subramanya* [3]). The Madras High Court holds that the power to order security subsists even in pauper appeals, but that in view of the circumstances under which a person is allowed to appeal as a pauper, he should not be called on to furnish security except on 'very special grounds'. This seems to us to be the correct principle, especially when taken with another rule, well established in this country (though the practice in England seems to be different. *Harlock* v. *Ashberry* [4]) that the poverty of the appellant is of itself no reason for calling upon him to find security for the costs of the respondent.

We would point out, to begin with, that the words 'in so far as they are applicable' which in the Codes of 1859 (S. 367) and 1882 (S. 592) qualified the applicability to pauper appeals of the rules of the chapter relating to appeals, have now been clearly confined to the 'provisions relating to suits by paupers' (see O. 44 R. 1) and there is accordingly nothing in the language of the rule to exclude the application of O. 41, R 10 to pauper appeals. Next, we are with all respect unable to accept the propriety of applying the *generalia specialibus* maxim to the present case. O. 44 no doubt makes special provision for pauper appeals, but that is in reality an *additional* provision, and unless it can be maintained that as a result of its enactment the *whole* of O. 41 is excluded—and this is obviously impossible to maintain—it is difficult to see how a particular clause thereof can alone be put aside on the strength of that maxim.

As to the guidance derivable from English precedents, we have to point out that in the present instance they cannot be safely relied on in view of the basis and history of the rule in England. The history of the practice in England as to the award of costs in proceedings by and against paupers will be found stated in *Carson* v. *Pickersgill and Sons* [5] and *Richardson* v. *Richardson* [6].

1. (1871) 17 W. R. 68.
2. (1880) I. L. R. 3 M. 66.
3. (1907) 17 M. L. J. 583.
4. (1881) L. R. 19 Ch. D. 84
5. (1885) L. R. 14 Q. B D. 859,
6. L. R (1895) P. 276.

what is material for us to note in the present connection is that in England a person allowed to sue in *forma pauperis* is under *no liability even if unsuccessful,* to pay any costs to the opposite party. This was laid down by statute as early as in the days of Henry VIII and continues to be the rule even to-day. Under 23 H. VIII C. 15 a pauper was never to pay costs, but if unsuccessful was to suffer *other punishment,* in the discretion of the Judge which in the days of Elizabeth used to take the form of whipping and the pillory (see Registrar's note in *Drennan* v. *Andrew* [1]).

Hence it is that in England there *can* be no order for security for costs against a pauper, for, he is in no contingency liable to pay any. And in *Wille* v. *St. John,* the Court of Appeal had to lay down that an order for security became a dead letter if within the time limited, the appellant obtained leave to appeal as a pauper. Likewise it was held in *Biggs* v. *Dagnall* [2] that a person who in the court below had been allowed to sue as a pauper could as a matter of course prefer an appeal in *forma pauperis,* without special leave and without giving security for costs. The reason on which the English practice rests cannot hold good in this country, for here a pauper plaintiff is not exempt from liability to pay his opponent's costs, though till 1908, he was also liable to be fined or imprisoned if his suit was found to be frivolous or vexatious) see *Jetha Mulchand* v. *Gulraj* [3]. Nor is there any real exemption even as regards the court fee due to Government ; there is only a *postponement.* That the English practice does not rest on any principle of general applicability may also be seen from the fact that in the Matrimonial Court there was no such established rule. These, as pointed out by Sir F. Jeune in *Richardson* v. *R* [4] no rule of law or practice disentitled the successful opponent to costs on the ground that the petitioner sued as a pauper and the President went on to observe 'whether a wife should obtain an order against a pauper husband for security, with a stay on failure to provide such security, is a matter as to which no clear rule of practice exists'.

By way of further illustration of the difference between the considerations obtaining in England and those which should govern us here, we may point out that under the English practice a pauper suitor, even in the event of success, is not

1. (1866) L. R. 1 Ch Ap. at p. 301.
2. (1895) 1 Q. B. 207.
3. (1884) I. L. R. 8 B 577.
4. L. R. 1895 P. 276.

entitled to recover from his opponent anything by way of counsel's fees or solicitor's remuneration, for he is not himself bound to pay them any fees (Cf. *Carson* v. *Pickersgill* [1], *Johnson* v. *Lindsay and Co* [2]). But that is not the case in India. Other instances where the Court in India refused to follow the English practice will be found in *Venkatanarasayya* v. *Achemma* [3], as to the maintainability of a pauper suit on behalf of a minor, though the next friend may not be a pauper— and in *In re Mary Ann Bill* [4], where the court permitted an administrator to sue in *forma pauperis.*

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1. (1885) L. R. 14 Q B. D. 859.
2. L. R. (1892) A. C. 110.
3. (1881) I. L. R. 3 M. 3.
4. (1884) I. L. R. 7 M. 390.

Zipru v. Hari Supdushet : I. L. R. 42 B. 10.

There is scarcely any room for doubt as to the correctness of the view here taken that when in the new Civil Procedure Code reference is made to an order 'under' a particular section, the reference comprehends an order in the *negative* as well as one in the affirmative, though the particular section *in terms* provides only for the affirmative order. To the illustrations given in the judgment, from the Code itself, we may add a few from decided cases. See *Reassut Hossein* v. *Hadjee Abdoolah* [1], (order *under* S. 76 of the Registration Act 1871); *Venkatasami* v. *Stridevamma* [2], (order refusing to appoint a receiver); *Zabadajan* v. *Muhammad* [3], (order *refusing* to set aside an injunction); *Latchmi Narain* v. *Ramcharan* [4], and *Hari Lal* v. *Prayag Ram* [5], (orders *refusing* a temporary injunction).

But we beg leave to doubt the correctness of the assumption made by the learned Judges that if the order in question before them could be regarded as one 'made under' R. 101 of O. 21, Civil Procedure Code, an appeal therefrom was *necessarily* incompetent. Looking as we must to the substance and not to the mere heading of the application (cf. *Ram Narain* v. *Bandi Pershad* [6], and *Jogannath Mandal* v. *Jaladhar Mandal* [7]), this view is directly opposed to the decision of the Madras High Court in *Sivasamba Iyer* v. *Kuppan Sanban* [8], (see also *Gowri* v. *Vigneshwar* [9]). No right of appeal is of course given in such a case by O. 43; the question is as to the effect in this respect of the Explanation inserted in S. 47 of Act V of 1908, declaring a defendant against whom a suit has been dismissed to be nevertheless a party to the suit within the meaning of that section. This express provision has in some measure set at rest the marked difference of opinion that existed prior thereto. In the case under notice, the appellants before the High Court were parties defendants to a suit for specific performance of a contract of sale of family lands entered into by some only of the members of the family. There was a decree against the latter, but the suit was dismissed as against the appellants, without any determination of the question of the binding character of the sale as against

1. (1876) I. L. R. 2 C. 131.
2. (1886) I. L. R 10 M. 179.
3. (1892) I. L. R. 15 A. 8.
4. (1913) I. L R. 35 A 425.
5. (1913) 17 C. W. N. 996.
6. (1904) I. L. R. 31 C. 737.
7. (1917) 26 C. L. J. 317.
8. (1915) 29 M. L. J. 629.
9. (1892) I. L. R 17 B. 49.

their interests. The plaintiff nevertheless took possession, in execution, of the *whole* property and the appellants had therefore to apply under O. 21, R. 100. The procedure under that rule is not limited to *strangers* to the suit, but is excluded only so far as the 'judgment-debtor' is concerned and an exonerated defendant may therefore come in under it and yet claim the benefit of S. 47. In the words of Bhashyam Iyengar, J. in *Kasinatha* v. *Uthumansa* [1] an order is not the less an order under S. 47 because it is also passed under some other section of the code (cf. *Venkatakrishna* v. *Krishna* [2] and the cases there cited, allowing an appeal in certain circumstances, against orders in rateable distribution proceedings). In any event it will be little more than a formal difference, even if it should be held that an application of the kind in question by such a person should be regarded as lying only under S. 47 and not under O. 21, R. 100 (cf. *Imdad Ali* v. *Jagan Lal* [3].) Where it could be held that as a result of the exoneration the person has ceased to be a 'party to the suit' the position may be different (cf. *Krishnappa* v. *Periasami* [4] and the observations thereon in *Sannamma* v. *Radha Bayi* [5]). The learned judges in the present case recognise that the appellants though not judgment-debtors were 'parties to the suit' within the meaning of S. 47, but they seem to think that an appeal, on the footing of the applicability of S. 47, cannot lie in cases covered by R. 103 of O. 21. No reason is assigned in the judgment; but the argument, as reported would seem to rest this view not on the ground that the question was not one relating to the execution etc., of the decree but on the 'conclusiveness' (subject to the result of a separate suit) enacted in R. 103 in respect of orders under rules 98, 99 and 101. Taking it to be the true principle that a person who has a right of appeal under S. 47 should not be deprived of it except in so far as the Code expressly denies it (see *Raja of Karvetnagar* v. *Venkatareddi* [6] it appears to us that the 'conclusiveness' provided for in R. 103 ought to be understoood as being subject to the other provisions of the code; and if, under the latter, a party is in a position to invoke the interference of a higher tribunal this doctrine of finality cannot preclude it. Reference may be made in this connection

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1. (1901) I. L. R. 25 M. 529.
2. (1916) 31 M. L. J. 820.
3. (1895) I. L. R. 17. A. 478.
4. (1916) I. L. R. 40 M. 964.
5. (1917) 34 M. L. J. 17.
6. (1915) I. L. R. 39 M. 570

to *Sabhapati* v. *Narayanasami* [1] where an order in claim proceedings though ordinarily final was, in cases arising on the Original Side of the High Court, held subject to appeal under clause 15 of the Letters Patent and to the cases which uphold a right of appeal from orders in claim proceedings initiated by exonerated Defendants.

Ramanamma *v.* **Bathala Kamaraju,** I. L. R. 41 M. 23.

In any view we think Art. 13 was inapplicable to this case for Art. 13 applies only to " suits to alter or set aside a decision or order of a Civil Court in any proceeding other than a suit." An order for rateable distribution under S. 295, C. P. C. is not such an order see *Shankar Sarup* v. *Mejo Mal* [1]; we don't quite see how an order in a claim proceeding on an attachment whether pending suit or in execution could be an order in a proceeding other than a suit. Therefore, even assuming the defeated party was bound to set aside the order, the only article of limitation applicable to his case would have been Art. 120. It is worthy of consideration whether if really the legislature intended that these orders ought to have conclusive effect unless set aside, special provision would not have been made for them in Art. 11 which provides for claims on attachment in execution or may it be that having regard to the somewhat remote or contingent nature of the damage sustained by the defeated party the legislature has made a distinction between the two cases and allowed such suit to be governed by art. 120? O. 21 R. 63 is one of the group of sections coming under the heading, investigation of claims and objections. Under a section worded similarly to Order 38 R. 8 in the C. P. C. of 1859, it was held that the application of the section corresponding to O. 21 R. 63 was thereby attracted, *Kartick Chunder Mookerjee* v. *Mookta Ram Sircar* [2]. A very strict construction might exclude from the scope of the words "manner of investigation" the passing of orders but the words cannot in the context be reasonably so construed. If the passing of orders is included, we do not see why the conclusive effect given by the section should not also be extended to the orders. The language is not happy but we should prefer the wider construction.

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1. (1901) I. L. R. 25 M. 555. 2. (1901) 23 A. 313. (P. C.)

Ammeraju v. Sheshamma, I. L. R. 41 M. 33.

The question in the case was whether "suicide" is an act forbidden by the Indian Penal Code within the meaning of the definition of coercion in S. 15 of the Contract Act. *Suicide* is not punished not because it is not forbidden but because the offender is beyond the reach of human authorities. Suicide may come within the definition of culpable homicide though there is a certain amount of incongruity in dealing with it as such, for instance, in cases where the culprit is above 18 years, it won't amount to murder, and as such be punishable only with transportation for life or less but in the case of minors it would amount to murder and be punishable on that footing with death. However that may be, attempted suicide being punishable, it is, we think, the more reasonable view to take that suicide is an act "forbidden by the Penal Code."

Kurugodappa v. Soongamma, I. L. R. 41 Mad. 41.

As pointed out by Mr. Justice Sadasiva Iyer, the security given under Order 32 R. 6 is for the proper application of the property received for the benefit of the minor party and a person who stands surety is not one who has become liable "for the performance of any decree, for the restitution of any property taken in execution or for the fulfilment of any condition imposed upon any person under the order of the Court" within the meaning of S. 145, C. P. C. "Protection of the property from waste" is obviously not the condition imposed by the order under R. 6, O. 32. The only condition imposed by the order is the furnishing of security.

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1. (1868) 10 W. R. 21.

Subrahmanya Ayyar v. Rathnavelu Chetty : I. L. R. 41 M. 44.

The point in question is not covered by the authority of any express texts and we are afraid a rule has been extracted, out of somewhat incoherent principles in favour of the putative father's right to inherit. If the illegitimate son, in the case of Sudras, is to be regarded as being in the same position as the adopted son, his right to collateral succession will have to be recognised, but this is inconsistent not only with the rulings but also with the texts. He is nowhere classified as a *son* entitled to succeed to the father's *Sapindas* and *Samanodakas*. Unlike the adopted son, he may not be given any share at all at the partition. This circumstance along with his going shares with the wife, daughter and daughter's son who take the heritage only as obstructed heritage, unerringly indicate that he takes no interest by birth as a **son** does. The text does not, admittedly, except in this one instance, recognise illegitimate relations. It is futile to refer to rules of succession applied to situations unprovided for on the basis of equity and good conscience framed on the analogies of Hindu Law or based on usage to castes governed by the law. No doubt the Privy Council has applied the rule of survivorship as between an illegitimate son and his legitimate brother. But it must be noted, that the Privy Council has not accepted the rule that survivorship is to be found only in respect of unobstructed heritage. See *Juggumpet case* [1]. Investigation into the history of Hindu law has come into vogue recently apparently under high auspices. In discussing Bandhu succession, it will be found the Privy Council has chosen to use its construction of Manu to practically modify Mitakshara, a course obviously the opposite of that recommended by the Privy Council in the Ramnad case. Centuries of progressive interpretation have purged the Hindu law of many of its grosser *elements* and it is to be regretted that the courts should be at pains by reference to ancient history to revive the '*natural*' rights of illegitimate relations. Humanity requires that they should be maintained and the Hindu Law makes ample provision in that respect. Why introduce illegitimate relationships in the scheme of inheritance more than what the law strictly requires?

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1. (1902) I. L. R. 25 M. 678.

Vaidyanatha Sastri *v.* Savithri Ammal: I. L. R. 41 M. 75 (F. B.)

The judgment of Davies and Sir Bhashyam Aiyangar, JJ. in *Sreeramulu* v. *Kristamma* [1] was something of a surprise even at the time and the subsequent decisions had not improved the outlook. The other High Courts have taken a different view and the decision of the Privy Council in *Bonamali Roy* v. *Jagat Chandra Bhowmick* [2] though it does not refer to *Sreeramulu* v. *Kristamma* [1] seems to sound against it. The *ratio* of the decision of Sir Bhashyam Aiyangar is that the widow has a power to alienate for her life, or during her widowhood, the latter being a rider necessitated by the Widow Remarriage Act, and adoption could not divest the interest created in the interim in favour of a stranger. Undoubtedly there are analogies in the history of the restrictions imposed on the widow's power of adoption making that view plausible. If the widow is herself in possession as heir of the person to whom she adopts or as heir of her unmarried son, she may adopt but not if the property in the meanwhile vests in another. Similarly she may adopt where the property vests in another by survivorship but if it makes a further descent by inheritance, the power is at an end. Is not the plain implication of this that the power to divest is restricted to what the widow possesses? Is the widow's case different from that of a co-parcener in possession at the time of the alienation but whose estate is subsequently divested by the adoption by the widow of a deceased co-parcener (*Sivagnanam Servaigar* v. *Ramaswami Chettiar* [3],) or from that of a father who makes an alienation and subsequently a son is born to him? The injunctions prohibiting alienation in the case of the father do certainly cover cases where there is no son in existence. Nor can it be contended that texts directed to make the widows live abstemious lives contain anything more than moral injunctions; the very direction as to *chastity* has been declared by the Privy Council to be not a condition of the estate. To say that the restrictions on *powers* of alienation are inseparable from the widow's estate is to beg the question for the very question at issue is what her power is. But the *obiter dictum* in the Ramnad case (though it can by no means be said that then the nature of the widow's powers and estate had been

1. (1903) I. L. R. 26 M. 143. 2. (1905) I L. R. 32 C. 669.
3. (1911) 22 M. L. J. 85.

fully settled) and the implication of the decision in *Bonamali Roy* v. *Jagat Chandra Bhowmick* [1], are in favour of the narrower view adopted by the Full Bench in this case.

Kandasami Naicken *v.* **Irusappa** : I. L. R. 41 M. 102.

We agree with the conclusion in this case. Where a person purports expressly to act on behalf of one person, why should the court hold that she acts also on behalf of another of whose existence even she was not aware. If *A* purports to act on behalf of *B* in one capacity and it turns out that the act can be upheld if he is taken to act in another, or if *A* acts without indicating on whose behalf he does so act, the court may uphold the act by referring it to the power the person can exercise provided of course the power can be not unreasonably held to be intended to be executed. It may even be that though a person purports to act on his own behalf if the circumstances do not exclude the possibility of his acting for another also the court may uphold the transaction. But if he purports to act in defiance of another's rights or if he purports to act on behalf of one, and being unaware of the existence of another, an intention to act on behalf of the other that cannot be reasonably inferred it is difficult to uphold the transaction as being on behalf of that other person also. We also agree that the right of the brothers cannot be considered a joint right merely because there is a common feature about the claim of both, *viz.*, that they both have to sue to recover possession. But the suit of the one brother is primarily a suit for *setting aside the guardian's act* while that of the other is to *recover possession* from a trespasser.

Thema *v.* **Kunhi Pathumma** : I. L. R. 41 M. 118.

We respectfully beg to question the soundness of this decision. The article of limitation applicable to the case of a tenant is Art. 139, and the starting point for limitation is when the tenancy terminates. The right to compensation

1. (1905) I L. R. 32 Cal. 669.

is a right which arises after the termination of the tenancy. The wording of S. 5 of the Malabar Tenants' Compensation Act itself 'notwithstanding the determination of the tenancy' shows that payment of compensation is not a condition precedent to the determination of the tenancy. Except under Art. 144, possession need not be adverse. Under Art. 139, limitation may be running though the possession is not at all adverse. Though the Malabar Compensation Act proceeds on the principle that the tenant is entitled to be paid compensation, a principle common to Malabar and South Canara, there is danger in applying that Law to cases not governed by it, as the Act has in material particulars departed from the usage of Malabar.

Gunjeshwar Kunwar v. Durga Prashad Singh : I. L. R. 45 C. 17 (P. C.)

The grounds of exclusion from inheritance under the Hindu Law, though they have formed the subject of consideration in several reported cases, still baffle any definite enunciation of an underlying general principle. For instance, it may now be taken as settled, that blindness or deafness, to act as disqualification, must be congenital. But what about dumbness? That is not qualified in any of the texts by any epithet denoting congenitality. If anything, dumbness and insanity being coupled together in the text of Manu, it may reasonably be contended that if insanity even when not congenital may be a disqualification, dumbness might as well stand on the same footing. But as against this, there is the familiar argument that no reason can be suggested why dumbness should stand on a worse footing than blindness or deafness, so as to be a disqualification even when not congenital. As regards insanity, the cases have assigned no particular reason for holding supervening insanity to be a ground of exclusion, except that the language of the texts leads to that conclusion. And even on this point there has been some uncertainty on account of what is now held to be an erroneous reading of the text of Narada adopted by Jagannadha. Sir Thomas Strange laid down that exclusion from inheritance was based upon incapacity to perform the obsequies of the deceased. This can be so only on the footing of his primary assumption that succession itself rests upon capacity to offer funeral oblations, but neither of these can be said to be true under the Mithakshara system. Their Lordships' pronouncement in the present case helps us to no general hypothesis either. Beyond following the Indian authorities cited, the only observation they add is, that it should not be assumed that the author of the Mithakshara could have intended by the use of an ambiguous description to extend the prohibition of Manu.

The decision on the facts of the case affirms the well-established rule, that a compromise obtained by putting forward a claim which the claimant himself could not have honestly and *bona fide* believed in, cannot be supported as a compromise. But we are not sure if their Lordships are not assuming too much when they observe that it is "inconceivable that ladies in their position could have been in ignorance of the well-known rule of the Hindu Law," as to disqualification on the ground of congenital blindness.

Solomon Jacob *v.* **The National Bank of India Ltd. Aden**; I. L. R. 42 B. 16.

The principal question in this case related to the right of a person to recover from the agent of another, money which under a mistake of fact he had paid to that agent to be handed over to his principal. The authorities lay down that under certain circumstances an action will lie against the agent and that under other circumstances it will not. But as pointed out by Beaman, J., it is by no means easy to define the exact principle on which they rest; and on this will to a certain extent depend the decision of the question, what particular acts of the agent in relation to his principal will absolve him from liability to be sued for the return of the money. In the case under notice all that appeared was (1) that as soon as the money was received the agent (The National Bank of India, Aden) sent a telegram to the principal (The Anglo-Egyptian Bank, Malta) informing him of the payment and (2) sent to the principal a demand draft on London, for the amount paid, less charges and commission. Scott, C. J., holds (Beaman, J. *dubitante*) that the second circumstance alone would not preclude a suit against the agent. But on the first, both the learned Judges rely as a bar to the action following. *Deutsche Bank* v. *Beriro* (1895, 73, L. T. 669). The Chief Justice treats the case as governed by the law of estoppel; Beaman, J., points out with considerable force that the question cannot really be one of estoppel properly so called, but he nevertheless thinks that in one class of cases, *viz.*, where the agent is held not liable because of his 'having done something to alter his position *qua* his principal' —as distinguished from actual payment over to him—the authorities deal with the question in terms of the law of estoppel.

What conduct on the part of the agent—apart from payment over to the principal—will bring the case within the rule of non-liability is properly a question of fact—per Lord Mansfield in *Buller* v. *Harrison*—but even here, the course of decisions, as is not uncommon, has tended to crystallise the conclusions of fact into legal presumptions, if not rules of law, and one cannot help feeling that among the several English cases on the point, some at least are reconcileable with the rest only on subtle, if not unsubstantial, distinctions. Much will no doubt depend upon the nature and course of the particular business in connection with

which the transaction takes place ;' but we venture to doubt whether in any view the learned Judges have not, in the present case, gone too far in holding that the mere intimation to the principal of the receipt of the money is conduct sufficient to absolve the agent from liability to be sued for return of the money. Scott, C.J., notes that on this very point *Cox* v. *Prentice* is a decision the other way, but he thinks that in the case before him an estoppel arises 'from the effect of the advice, having regard to the peculiar relations of the parties.' We regret we are unable to follow this. As appears from the judgment of Beaman, J. there was no evidence that anything had been done by the Anglo-Egyptian Bank on receipt of the intimation. The decision of the Court rests only on the 'possibility' that they might have in turn paid the money to their own customer.

There is not much point in saying that the payer has his remedy against the principal, for on this argument the agent's liability may be negatived in all cases—in so far at any rate as he did not act improperly or beyond the scope of his authority—and the decision need not be made to depend upon whether the agent has paid over the money or parted with his control over it or not (cf. *Ellis* v. *Goulton* [1], where however there was no question of mistake). Indeed some of the observations in *Sadler* v. *Evans* [3] would seem logically to lead to this position, as when the court say, "The money was paid to the known agent of Lady W. He is liable to her for it, whether he has actually paid it over to her or not, he received it for her." But even there an exception was made for 'special cases, as under notice or mala fide.'

The rule governing such cases was however treated as settled even so early as in 1777 when Lord Mansfield decided *Buller* v. *Harrison* [2]. But his observations there suggest that the defence founded on payment over to the principal or some act altering the situation of the agent was regarded as part of the general considerations of equity and justice governing the action for money had and received—a form of action which Lord Mansfield himself did much to develop and perfect (see also *Sadler* v. *Evans* [3]). Speaking of cases where the agent has paid over, he says ' it is just that one man should not be a loser by the mistake of another and the person who made the mistake is not without redress, but has his remedy over against the principal '; but he goes on to add, ' on the other hand,

1. L. R. (1893) 1 Q. B. 350. 2. (1777) 2 Cowp. 567.
3. (1766) 4 Bur. 1984.

it is just that as the agent ought not to lose, he should not be a gainer by the mistake. And therefore if after payment so made to him and before he has paid the money over to his principal, the person corrects the mistake the agent cannot afterwards pay it over to his principal.' In the particular case, the agent had, before receiving notice of the mistake, passed the whole sum in his account with the principals and 'given them credit for it against a sum of £3,000 in which they stood indebted to him.' On the motion for new trial, his Lordship pointed out that no new credit had been given and no real alteration in the agent's position had taken place and asked himself. 'Is it conscientious then that he should keep the money?'

Comparing the language employed in early decisions like *Buller* v. *Harrison*,[1] or *Cox* v. *Prentice* [2] with that used by the House of Lords in *Kleinwort Sons and Co.* v. *Dunlop Rubber Co.* [3], we are unable to see that the course of decisions in England has—as Scott, C. J., suggests—tended to recognise 'in more and more extended terms' the qualification in favour of the agent or that in the later pronouncements the simple application of the law of estoppel is reached. Nor is there sufficient in them to justify the view of Beaman, J., that there are *two* distinct *principles* traceable in them, one as governing instances where the money has been paid over to the principal and the other as applying to cases where the agent has done something else to prejudice his position. Later cases take the law as settled and discuss rather whether or not the particular facts of each case bring it under the rule as to non-liability than attempt to discuss the underlying principle or extend the scope of non-liability. In the Dunlop Rubber Co.'s case, Lord Atkinson remarked in terms that these decisions 'are little more than applications of the broad principle laid down by Lord Mansfield, C. J. in *Buller* v. *Harrison* [1]. And with but a single exception *Deutsche Bank* v. *Beriro* [4] they contain nothing to indicate that the point was there regarded as governed by the doctrine of estoppel. Adverting to the present topic, it is observed in Mr. Smith's Mercantile Law (1905 Edn. p. 195) that the question 'involves much difficulty'. Taking it to be the general rule of law that the agent is responsible to no one but his principal—*Respondeat Superior*—and that the agent would be estopped from questioning the title of his principal, cases like

1. (1777) 2 Cowp. 567.
2. (1815) 3 M. and S. 344.
3. (1907) 97 L. T. 263.
4. (1895) 73 L. T. 669.

Buller v. *Harrison* [1] and *Cox* v. *Prentice* [2] are sought to be justified on the ground that in these cases the principal could never 'have claimed to retain the money for a single instant, had it reached his hands, the payment having been made by the plaintiff under pure mistake of facts, so that the agent would not have been estopped from denying his principal's title to the money'. (See also American Cyclopaedia, Vol. 31, pp. 1481 to 1483). It is only in this sense that the law of estoppel bears on the matter under discussion, *viz.* the possibility of an estoppel between the agent and the 'principal' and *not as between the agent and the third party.*

The defence founded on 'alteration of position' formed part not only of the law of estoppel but of other branches of law as well, where the right to relief depended on considerations of 'equity' in a wide sense or the possibility of 'restitution in integrum'. That such a defence may be permissible in an action for money had and received or for recovery of money paid by mistake would appear from the tenor of the judgment of the Privy Council in *Colonial Bank* v. *Exchange Bank of Yarmouth* [3] (see also *Imperial Bank of Canada* v. *Bank of Hamilton*[4] and *Freeman* v. *Jefferies*[5], but *cf Durrant* v. *Ecclesiastical Commissioner* [6] *Baylis* v. *Bishop of London*) [7] but we scarcely think it would be right to regard it as a matter of estoppel in the sense of the definition in S. 115 of the Indian Evidence Act. We may point out in passing—especially in view of the concluding observations in Mr. Justice Beaman's judgment as to the omission of the plaintiff to communicate direct with the Anglo-Egyptian Bank and the risk which the defendant bank may run by stopping payment of its draft—that there is nothing in the cases under this head which will render inapplicable to it the following observation in the Colonial Bank's case :—"What then was the duty attaching upon the defendants? Clearly their duty was, directly Rogers informed them of the mistake, to learn the nature of the mistake and take care that they should be in a position to rectify it, * * * * * *. When the defendants were told that a mistake was made, an equity was fastened upon them not to alter the position of the fund until the mistake could be repaired."

1. (1775) 2 Cowp. 567.
2. (1815) 3 M. and S. 344.
3. (1885) L. R. 11 A. C. 84
4. L. R. (1903) A. C. 49.
5. (1869) L. R. 4 Ex. 189.
6. (1880) L. R. 6 Q. B. D. 234.
7. L. R. (1913) 1 Ch. 127.

We must agree with the learned judges that the decision in *Shugan Chand* v. *The Govt. N. W. P.* [1] is inconsistent with the English authorities and that *Tugman* v. *Hopkins* [2] which it purported to follow was not really an analogous case. Reliance was placed on the general language of S. 72 of the Indian Contract Act—which contains no qualification as stated in the English cases referred to—and that circumstance is drawn attention to in the present case also. Scott, C. J. gets over it by saying that that section must be read subject to S. 115 of the Evidence Act and Beaman, J., suggests that the section must be held to relate to transactions between principals and not to an agent acting for one of them. The latter view may enable us to take out of the operation of the statute the class of actions against the agent and thus give the court a freer hand in deciding the case on general principles. But still the difficulty will remain, whether or not in cases arising as between principals, the rule enacted in S. 72 is to be subject to any qualification at all. (*Cf. Muhamad* v. *Ottayil* [3] though the facts there were different and the decision was before the Contract Act—note also the restriction in S. 36 of the Specific Relief Act against rescission on the ground of mistake where the other party cannot be substantially restored to his former position.)

It remains to refer to the judgment in *Deutsche Bank* v. *Beriro*, on which the present decision purports to be mainly founded. The report of the case before the Court of Appeal is anything but informing, as it merely states that 'without considering that part of the judgment of Mathew, J. which was based on the authorities, the Court of Appeal came to the conclusion that his view 'as regarded the facts was right.' Turning now to the judgment of Mathew, J., the learned judge put his decision on two grounds. First, he said, "The defendant employed the plaintiffs to collect the amount of the bill and to inform them accurately as to whether the bill had been paid or not. * * * The plaintiffs were guilty of a breach of duty towards the defendants. * * They informed them of that which was not the fact * * * * and handed them the money. Upon what ground of law or equity can they say that they can get rid of the consequences of their breach of duty because they had made a mistake.' It can scarcely be suggested that this line of reasoning (or the authorities like *Skyring* v.

1. (1875) I. L. R. I. A. 79. 2. (1842) 4 M. & G. 389.
3 (1863) 1 M. H. C. R. 390

Greenwood [1], *Chambers* v. *Miller* [2] and *Pollard* v. *Bank of England* [3] on which it is rested) can be applied to the case under notice. It is also significant that the judgment of Mathew, J. contains no reference to the line of cases beginning with *Buller* v. *Harrison*.[4] The second ground of decision is the estoppel arising from the circumstance that on the faith of the plaintiff's representation the defendant had informed his principal of the receipt of the payment and credited it in his account. In the particular case there was an *express* representation by the plaintiff, apart from the fact of payment, and that too, a representation in respect of a matter with reference to which a duty was cast on him. That was not the case here; and if the learned Judge is to be regarded as having laid down generally that the mere fact of payment by the plaintiff followed by intimation thereof to the principal or even crediting it in the principal's account is to be a bar to the plaintiff's suit against the agent, we must assume that he meant to differ from a number of earlier decisions without even referring to them.

There is one other case (*Davys* v. *Richardson* [5]) where language akin to that of the law of estoppel is employed in the judgment of the Court of Appeal. The question there however did not arise at the suit of a person who had paid money under a mistake and the Court had to deal with the matter as one falling under its jurisdiction over solicitors as officers of the court. The view that found favour with Lindley and Lopes L. JJ. was that in drawing certain moneys from court and paying them over to his client, the solicitor had not acted improperly because he had been misled into so doing by the pleadings on the other side and they accordingly refused to make an order against him for refund of the money.

Swarnapandia Tevar *v.* Zamindar of Urkad: I. L. R. 41 M. 109.

There is no special reason why the period antecedent to the suit should be taken to be the period contemplated by the clause. The commutation does not take effect from the commencement of the suit but only from such date as the collector may fix. In these circumstances, we think the reasonable period to take is the

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1. (1825) 4 B & C. 281.
2. 13 C. B. N. S. 125.
3. L. R. 6 Q. B. 623
4. (1777) Cowp. 567.
5. (1888) L. R 21 Q. B. D. 202,

period antecedent to the determination of the question and we also think that the years must be the *tenancy years* and not the years according to this or that system of reckoning. As regards the cesses we don't think that the mere fact that there was an agreement relating to the cesses should legalise their levy as held in 22 W. R. 12 but the proposition as stated in this judgment may not be open to exception. Where there has been a compromise, that is to say a compromise of doubtful claims, it should not be open to either party to question the legality or propriety of the amount of rent fixed.

Chidambaranatha Thambiran *v*. Nallasiva Mudaliar : I. L. R. 41 M. 124.

A suit is a suit for possession whether the possession is claimed for the plaintiff or for some one else provided the person in possession is not to be continued in possession so that we think the proper article applicable to a suit by a disciple to recover possession for the mutt from the alienee of the Matadhipathi is Art. 134 or 144 as their Lordships hold in this case. The former article is general and applies to all suits to recover possession by whomsoever brought and the starting point of limitation is the date of alienation. The latter article however presents some difficulty. The third column makes limitation start from the time when the possession of the defendant becomes adverse to the plaintiff. But seeing that "plaintiff" includes a person from whom plaintiff derives his title to sue pace *Mahamaya Debi* v. *Haridas Haldar* [1], the defaulting trustee himself can sue to recover the land from the alienee when the alienation is bad, there is no difficulty in holding the possession adverse to plaintiff. Even otherwise, why is not the possession of the alienee adverse to the beneficiary from the date of the alienation? The legal position of mutt property stated one way is property of the *institution*, the institution being regarded as corporation; looked at from another point of view it is property dedicated to the religious use of the community. The institution or deity is only an abstraction. As suggested in *Bhupathi Nath Smrithithirtha* v. *Ram Lal Maitra* [2], the deity or the institution is but a compendious expression of the idea of dedication for religious purposes for the benefit of the community. We do not think that there is the slightest distinction in principle

1. (1915) I. L. R. 42 Cal. 455. 2. (1909) I. L. R. 37 Cal. 128.

between the beneficiary's right to interfere to protect the estate in the case of a mutt and that of a temple. The beneficiaries may be a larger body in the latter case than in the former and the Matadhipathy's power of disposition may be greater than that of a temple trustee. But neither of these circumstances can affect the beneficiaries' right of suit. Even the somewhat discredited theory of *Corporation Sole* does not preclude the notion of trust and in fact *Vidyapurna's case* [1] recognises the right of the disciples to have the vacancy in the office filled up through court. Mr. Justice Sheshagiri Aiyar has, we think, very clearly shown that the recognition hitherto accorded to the beneficiaries' right is quite in keeping with the principles adopted in the Trust Act and the English decisions relating to trusts.

Yullappa *v.* **Bheema Rao**: I. L. R. 41 M. 156. (F. B.)

All the learned Judges in this case are agreed that mere knowledge on the part of the trespasser that his act is likely to annoy the possessor is not sufficient to convert the trespass into a criminal trespass but Mr. Justice Ayling would hold that if the trespasser knew for certainty that his act would cause annoyance, his act would be criminal trespass. But in the instances given by his Lordship where the alternative intent suggested by the party is too trivial to be attributed to any reasonable person, the Court may well infer an intent to annoy. As pointed out by the other learned Judges there may be two intents with reference to the same act but if it is clear that the intent or object (to paraphrase the term as used in the Penal Code) is not annoyance, we do not see how the knowledge of the practical certainty of annoyance can convert the knowledge into intent.

Lingayya *v.* **Chinnaramaya**: I. L. R. 41 M. 169. (F. B).

We doubt if sufficient attention has been paid in this case to the language of S. 46 of the Provincial Insolvency Act. That section does not say that an appeal shall be filed within 90 days of the order but merely says that the period of limitation shall be 90 days. The *terminus ab quo* is not stated. We should think in those circumstances there is nothing in S. 29 of the Limitation Act to preclude the application of the rules as to computation given in it. Those

1. (1909) I. L. R. 27 Mad. 435.

rules do not affect the period of limitation for the simple reason that the period of limitation prescribed in S. 46 is not a period from a particular date but a period of 90 days, the method of computation not stated. It will be found that under S. 12 of the Madras Forest Act on which 34 M. 505 is a decision limitation is expressly made to run from the date of the judgment appealed against. We do not mean we are satisfied with the view taken that these rules as to computation *affect* the *periods of limitation* prescribed in the Act. The rules as to computation are assumed by the Limitation Act not to affect the *period of limitation*. The language of Ss. 6 and 29 seems clearly to indicate that these rules are intended to have wider application than the Limitation Act. The interpretation accepted in the two Full Bench cases would seem to have the effect of practically confining them to the Limitation Act. In the Forest Act cases, for instance, all the stringency disappears when the appeal is from the District Court to the High Court.

Kunhi Moidin *v.* Chamu Nair : I. L. R. 41 M. 182.

It is time that this anachronism of a Workman's Breach of Contract Act is altogether removed from the statute book. It enforces specific performance of *personal contracts* with, unlike in the case of the ordinary civil courts, the sanction of rigorous imprisonment. The Act should receive, we think, a very strict construction and all attempts to put a liberal construction upon the act are to be regretted. We are glad the majority take a restricted view, though that view runs counter to come early cases which seem to assume that the person undertaking to supply coolies or to superintend them is a workman. As their Lordships point out, workman can only mean a man who contributes in the ordinary parlance, physical, not intellectual labour.

[*End of Vol. 34, N. I. C.*]

NOTES OF RECENT CASES.

Chief Justice and Sadasiva Iyer, J. — S. A. No. 1912 of 1916.

Hindu Law—Joint Family—Will by father of ancestral properties in favour of his undivided son, nephew and others—Subsequent partition—If revokes will—Will, how far operative—Hindu Wills Act, Ss. 2 and 3—Succession Act, S. 57—Principles underlying applicable to Mofussil Hindu Wills.

Where, in a joint family consisting of a father, a son, and brother's son, the father makes a will of all the joint family properties equally in favour of his undivided son, nephew and his daughter's son, and subsequently effects a division of all the family properties and takes a ⅓th share and dies possessed of his ⅓th share and divided from his son and nephew.

Held, reversing the Judgment of the Court below: That the will is not invalid by reason of the father being joint at the time of its execution, that it is not revoked by the subsequent partition, and that it is valid and operative as regards the ⅓th share.

Held, further, that the principle underlying S. 57 of the Succession Act, and incorporated in the Hindu Wills Act, by Ss. 2 and 3 of the Hindu Wills Act, ought to be applied to Hindu Wills executed in the Mofussil also.

30 M. 369 (F. B.) followed.

C. Rama Rao for *P. Narayana Murthy* for the Appellant.

V. Ramesam for the Respondent.

Oldfield and Sadasiva Iyer, JJ. 1918, January 7. — C. R. P. No. 78 of 1917.

Limitation Act, art. 182 (5)—*Execution of decree by attaching decree-holder—Application for adjournment to produce a copy of order of attachment—Step-in-aid.*

An application for execution of a decree by an attaching decree-holder was presented on 11—9—1916. It was found that the last application for execution was presented by him on 9—9—1913, that it was returned by the Court for production of the order of attachment of the decree sought to be executed, that on 14—2—1914 the executing decree-holder applied for a month's adjournment to enable him to produce a copy of the order and that on his default in producing the same the execution petition was eventually dismissed. *Held*, that the application dated 14—2—1914 praying for an adjournment was a

step-in-aid of execution and was effective to save the present application from the bar of limitation.

I. L R. 38 M. 695; 32 M. L. J. 621 followed.

S. Panchapagesa Sastri for Petitioner.

K. S. Jayarama Iyer for Respondent.

Chief Justice and Sadasivaiyar, J. }
1918, January 8. } C. C. C. A. No. 7 of 1917.

Decree—Suit to set aside—Maintainability—Decree obtained by suppression of facts and by use of perjured evidence—Effect.

In this case their Lordships referred to the Full Bench the question whether a suit would lie to set aside a judgment on the ground that it was obtained by the suppression of facts and by the use of perjured evidence.

K. S. Ganapati Aiyar for Appellant.

K. Venkataraghavachariar for Respondent.

Spencer, J. }
1918, January 8. } C. R. P. No. 1393 and 1394 of 1916.

Arbitration—Award—Joint action of arbitrators, necessity for—Award signed by two out of three arbitrators—Application to set aside—Limitation Act, art. 158, *applicability of—C. P. Code, Sch. II, para.* 15.

Even in a case where the parties to a reference to arbitration agree to be bound by the award of the majority of the arbitrators, the presence of all the arbitrators at all the meetings including the last when the final act of arbitration is done is essential to the validity of the award and an award given and signed by two out of three arbitrators without consulting the third is invalid and therefore liable to be set aside.

I. L. R. 7 A. 523; I. L. R. 12 M. 113; 25 C. L. J. 396 Referred to.

An application to the court to set aside an award on the ground that only two out of the three arbitrators had taken part in the final deliberations that preceded the award, is not governed by art. 158 of the Limitation Act which governs only applications setting out any of the grounds specified in para. 15 of Sch. II of the C. P. Code, 24 M. L. J. 483 followed.

T. Ramachandra Rao for Petitioner.

V. Ramadas for Respondent.

Bakewell and Phillips, JJ.
1918, January 8.

S. A. No. 456 of 1917.

Indian Paper Currency Act, (II of 1910) S. 26, proviso—Hundi payable to bearer on demand—Void—Provision for payment of interest—Representation that drawer had funds with his banker—Estoppel.

In a suit to recover money due on a *hundi* drawn on a banker which was dishonoured, the terms of the instrument were as follows:—

No. 3. ... Rs. 3,500.
21—5—14. ... Cr. Karaikudi P. L. S. M.

Dr.—C. T. N. Firm Rs. 3,500. This sum of Rs. 3,500 only with current interest from to-day to bearer S. Q. M. M. A. Karruppan Chetty at Rangoon to pay on demand, take endorsement and debit it to our account.

(Sd.) C. T. N. NARAYANAN CHETTY.

It was found as a fact that the drawer had no funds with the banker on whom the hundi was drawn.

Held that the *hundi* contravened the provisions of S. 26 of the Paper Currency Act and was therefore void, but that the drawing of the *hundi* itself coupled with the other evidence in the case might amount to a representation that the banker on whom the *hundi* was drawn had funds of the drawer enough to meet the hundi and that the drawer might be estopped from denying the truth of that representation.

I. L. R. 40 M. 585 relied on.

The Hon. T. Rangachariar for Appellant.

K. Krishnaswami Iyengar for Respondent.

Wallis, C.J. and Napier, JJ.
1918, *January* 9.

S. A. Nos. 1740 and 2592 of 1914.

Evidence Act, Ss. 68, 71—Mortgage—Execution—Proof—Attesting witness called but execution proved by other evidence—Sufficiency—sub-mortgage—Original mortgagee taking separate mortgages of same items for mortgage debt—Effect on rights of sub-mortgagee—Right of sub-mortgagee to bring to sale interest of his mortgagor.

S. 68 of the Evidence Act is satisfied by calling one of the attesting witnesses named in the mortgage—Its execution may, under S. 71, be proved by evidence other than that of the attesting witness.

Where A, a mortgagee of certain items of property from B, their owner, effected a sub-mortgage in respect of them to C and subsequently took two separate mortgages from B, each being in

respect of some of the said items, instead of the original mortgage as security for the mortgage debt, *held* that the transaction had not the effect of discharging the original mortgage and destroying the security of the sub-mortgagee and that the latter was therefore entitled to bring to sale the interest of his mortgagor.

T. R. Ramachandrayar, *T. R. Krishnaswami Aiyar* and *N. A. Krishnaiyar* for Appellant.

K. N. Aiya Aiyar for Respondents.

Oldfield and Sadasiva Iyer, JJ.
1918, *January* 15.

L. P. A. No. 73 of 1917.

Madras Local Boards Act, S. 73—Suit by landholder to recover one-half of road-cess paid by him, from the ryot—Nature of the ryot's obligation to pay road cess—Statutory liability—Limitation Act, Art. 120.

The obligation to pay road-cess by the ryot is a statutory liability under S. 73 of the Madras Local Boards Act, and S. 76 of the Act which says that the tenant is bound to pay rent to the landlord, does not apply to such payment.

The period of limitation for a suit by a landholder to recover one-half of road-cess from the ryot is that prescribed by the residuary Art. 120.

L. A. Govindaraghava Iyer and R. Krishnamachariar for Appellant.

Respondent not represented.

Wallis, C. J. and Spencer, J.
1918, January 15.

C. M. P. No. 1053 of 1917.

Privy Council—Appeal to—Withdrawal of—Application to be made to Privy Council.

Under Rule 32 of the Judicial Committee Rules, 1908, if an appellant to the Privy Council who has not lodged his petition of appeal, desires to withdraw his appeal, he has to make the application before the Privy Council and the High Court is not competent to entertain the same.

C. A. Seshagiri Sastri for Petitioner.

T. R. Ramachandra Iyer for Respondent.

Bakewell and Phillips, JJ.
1918, *January* 17.

S. A. No. 802 of 1915.

Benami transaction—Deed of sale—Suit to recover possession by real owner—Limitation Act—Article applicable—Art. 91 *or* 144.

A sale-deed was executed by the plaintiff in favour of the first defendant in 1895. The plaintiff alleged that the sale was a sham transaction and benami for the plaintiff and that she continued in possession till 1902, when she was dispossessed. The present suit is for possession against the benamidar the first defendant and those claiming under him. The defence was that the plaintiff could not recover without suing to set aside the sale-deed, and that the suit was barred under Art. 91 of the Limitation Act.

Held that the plaintiff need not sue to set aside the sale-deed, if it was intended to be inoperative, and that the period of limitation was 12 years under Art. 144.

35 Calcutta 551 (P. C.) followed.

T. Rangaramanujachariar for Appellant.

T. V. Muthukrishna Iyer, S. Ramaswami Iyer and *A. Swaminatha Iyer* for Respondents.

Bakewell and Phillips, JJ. 1918, January 21. } S. A. No. 1757 of 1916.

Dancing-girl—Property of—Succession to—Law applicable.

The law applicable to the succession to the property of a dancing girl is the analogy of the law regulating the devolution of the stridhanam property of a Hindu female.

M. Subbaraya Aiyar for *A. Krishnaswami Aiyar* for Appellant.

C. V. Anantakrishnaiyar (*P. V. Paramesvaraiyar* with him) for Respondent.

Bakewell and Phillips, JJ. 1918, January 22. } S. A. No. 639 of 1915.

Madras Estates Land Act, S. 6—Applicability—Land in question admittedly once pannai and alleged to have been afterwards converted into ryoti;

S. 6 of the Estates Land Act is inapplicable to a case in which the land in question is admitted to have once been pannai land and it is contended that it was afterwards converted into ryoti land.

T. Rangachariar and *Venkata Varadachariar* for Appellants.

T. R. Ramachandraiyar and *A. Swaminathaiyar* for Respondents.

Chief Justice and Sadasivaiyar, J. 1918, January 22. — S. A. No. 1904 of 1916.

Madras Estates Land Act, S. 46 (1)—Applicability—Jurisdiction of Revenue Court—Appellant under S. 46 (1) not admitted to be a non-occupancy ryot—Order of Revenue Court conferring permanent right of occupancy on him—Suit in Civil Court by landlord for declaration of invalidity of order and for declaration of defendant's status—Maintainability.

Where, on an application filed under S. 46 cl. (1) of the Madras Estates Land Act by a person claiming to be a non-occupancy ryot of certain land, the Revenue Court conferred upon him a permanent right of occupancy overruling the contention of the landlord that the applicant was a trespasser and not non-occupancy ryot at all, *held* that a suit by the landlord for a declaration that the alleged tenant was only a trespasser and that the Revenue Court had no jurisdiction to take action under S. 46 (1) of the Madras Estates land Act was maintainable in the Civil Court.

The Revenue Court has jurisdiction to take action under S. 46 (1) only in cases where the applicant is admitted to be a non-occupancy ryot.

P. V. Parameswara Iyar for *C. V. Anantakrishna Iyer* for Appellant.

L. A. Govindaraghava Iyar and *K. N. Kumaraswami Iyer* for Respondent.

Abdur Rahim and Oldfield, JJ.
1918, *January* 29.

A. S. No. 164 of 1916.

Landlord and tenant—Denial of landlord's title by tenant holding under permanent lease—Forfeiture—Overt Act if necessary before a suit for ejectment is instituted.

A denial of the landlord's title by a tenant holding under a permanent lease created before the Transfer of Property Act works a forfeiture of the tenancy and no overt act other than the institution of a suit for ejectment is necessary if the landlord seeks to avail himself of the forfeiture.

V. C. Seshachariar for Appellant.

T. R. Ramachandra Iyer for Respondent.

Chief Justice and Spencer, J.
1918, *January* 29.

A. S. No. 184 of 1917.

Vendor and Purchaser—Vendor's suit for damages for breach of contract by purchaser—Measure of damages—Vendor's right to interest on purchase-money.

In a suit by a vendor of immoveable property against his vendee for the recovery of damages caused by the non-payment by the vendee of the purchase-money on the due date, *held* that the proper measure of damages was the difference between the contract price and the market-value on the date of the breach.

Held further that the vendor was not entitled to compensation by way of interest on the purchase-money.

(1917) 2 Ch. 405 folld.

K. V. Krishnaswami Aiyar (*K. Balasubramaniya Aiyar* with him) for *A. Krishnaswami Aiyar* for Appellant.

C. V. Anantakrishna Aiyer (*P. V. Parameswara Aiyar* with him) for Respondent.

Ayling and Seshagiri Aiyar, JJ.
1918, *January* 29.

A. S. No. 377 of 1916.

Land Improvement Loans Act (XIX of 1883)—S. 7 cl. (c)—Scope and Effect—Property subject to encumbrances—Sale of, for loan due advanced thereon—Sale if free of encumbrances—Revenue Recovery Act, S. 42—Effect—Sale of lands other than that in respect of which arrears due—Sale free of encumbrances—Statute—Interpretation—Proviso to section how far guide to its construction.

S. 7 cl. (c) of the Land Improvements Loans Act relates not merely to the procedure prescribed by the Revenue Recovery Act but incorporates the substantive provisions of the said Act including S. 42.

Held, therefore, that a sale under the Land Improvement Loans Act of the land for the improvement of which the loan was advanced would be free of all incumbrances.

7 M. 434; 25 M. 572; 26 M. 230; 38 M. 356 distd.

Though the proviso to a Section cannot be used to extend the scope of the section, it can be looked at for construing the section if it is ambiguous.

(1897) A. C. 647 ref. to.

A sale under the Revenue Recovery Act of lands other than the lands in respect of which the revenue is due will also be free of incumbrances.

34 M 493 Approved.

C. V. Anantakrishnaiyer and P. V. Parameswaraiyar for Appellants.

Government Pleader for Respondent.

Oldfield and Sadasiva Iyer, JJ.
1918, January 30.

L. P. A. Nos. 157 and 158 of 1916.

Civil Procedure Code, O. 23 R. 1 (2) (a) (b)—Leave to withdraw with liberty to bring fresh suit—"Other sufficient grounds" if ejusdem generis with "formal defect"—Court having jurisdiction to entertain suit, if can give leave to withdraw—Revision.

On an objection taken by the defendant to the jurisdiction of the Court, it was found that the plaintiff had grossly undervalued the claim so as to bring it within the cognizance of the Munsif's Court. Thereupon the plaintiff, with a view to bring the suit within the pecuniary jurisdiction of the District Munsif applied for leave to withdraw the suit in respect of certain items with liberty to bring a fresh suit in respect of the same and the Court granted leave and ordered an amendnent of the plaint accordingly. *Held*, that the Court below acted with material irregularity, if not without jurisdiction, and the order of the Court below was unsustainable

Per *Sadasiva Iyer, J*:—The words "other sufficient grounds" in O. 23 R. 1 (2) cl. (b) of the C. P. Code are not *ejusdem generis* with the "formal defect" in cl. (a). 27 M. L. J. 480 Referred to.

It is only in cases where a Court has jurisdiction to entertain a suit as laid, that it can grant leave to withdraw a portion of the claim with liberty to bring a fresh suit.

G. S. Ramachandra Iyer, for Appellant.

T. V. Muthukrishna Iyer for Respondent.

Oldfield and Sadasiva Aiyar, JJ. 1918, *January* 30. — C. M. A. No. 285 of 1917.

Contract—Appropriation—Right of creditor—Right may be exercised at any stage.

Where after decree in a suit for sale upon a mortgage the mortgagor sold a portion of the mortgaged properties for payment of the mortgage debt without expressly appropriating it to principal or interest, *held* an appropriation of the amount by the creditor towards interest in an execution petition by him for recovery of the balance was valid and binding on the mortgagor.

B. Narasimha Rao for Appellant.

P. Somasundaram for Respondent.

Oldfield and Sadasiva Aiyar, JJ. 1918, *January* 30. — C. M. S. A. No. 87 of 1917.

Mortgage—Sub-mortgage — Suit for sale by mortgagee against mortgagor and sub-mortgagee—Decree for sale and payment to sub-mortgagee and then to mortgagee—Sub-mortgagee's right to execute decree.

Where, in a suit for sale upon a mortgage instituted by the mortgagee against his mortgagor and a sub-mortgagee of the same properties a decree was passed directing the sale of the properties and the payment of the sale-proceeds first towards the amount due to the sub-mortgagee and of the balance, if any, to the plaintiff, *held* that the sub-mortgagee though a defendant, could apply to execute the decree quite as much as the mortgagee himself.

36 M. 32, followed.

S. Muthia Mudaliar for Appellant.

K. Bhashyam Aiyangar, (*N. Kunjitapadam Aiyar* with him) for Respondent.

Chief Justice and Krishnan, J. 1918, *January* 30. — A. S. No. 193 of 1916.

Hindu Law—Widow—Compromise by—Validity— Landlord and tenant—Landlord a Hindu widow—Bona fide dispute as to existence of

occupancy rights—Compromise by widow recognising such rights—Binding nature of, on reversioners—Reversioner's suit to set aside decree based on compromise—Maintainability—Evidence Act, S. 116—Landlord and tenant—Estoppel—Muchilika by tenant admitting non-occupancy nature of tenancy—Effect.

Where there is a *bona fide* dispute as to whether the tenants of certain lands have occupancy rights in them or not, *held* a compromise by the widow, who has succeeded to the lands as heir of her husband, the landlord, recognising occupancy rights in the tenants is valid and the reversionary heirs of the deceased landlord have no cause of action to sue to set aside the decree based on such compromise.

An admission by a tenant in a muchilika that he is bound to give up his holding at the end of the term does not estop him in a suit in ejectment from contesting the correctness of the terms of the muchilika and setting up occupancy rights in the lands.

A. Swaminatha Aiyar for *T. V. Muthukrishna Aiyar* for Appellant.

B. Narasimha Rao and Ramadoss for Respondents.

Ayling and Seshagiri Aiyar, JJ.
1918, *January* 30.

S. A. No. 1459 of 1915.

Hindu Law—Partition Release by a co-parcener of his share whether effects severance—Renunciation by a co-parcener for no consideration, void—Sale by a co-parcener of his share whether the co-parcener is severed from the joint family.

Release by one of the co-parceners of his share to the other members of the family severs the co-parcenary so far as the releasing member is concerned. It does not disturb the status with regard to the other members of the family.

Renunciation of a co-parcener of his share without accepting any consideration is void. Alienation by the co-parcener of his interest in the joint family properties does not disturb the status of the family; and the alienee still continues a member of the joint family. Alienation by a co-parcener of his share is not an expression of unilateral intention to separate by which the joint family will be severed.

B. Sitarama Rao, for the Appellant.

K. Y. Adiga for the Respondent.

Bakewell and Krishnan, JJ.
1918, *February* 4.

S. A. No. 1712 of 1916.

Equitable mortgage—Letter reciting transaction—Registration if necessary.

Where certain persons who created an equitable mortgage by deposit of title-deeds, wrote a letter to the mortgagee, as follows:— "Equitable mortgage executed on 20-11-1909 by A. B. in favour of G. C. is as follows: As we have borrowed of you this day Rs. 600 under a promissory note, we have deposited the registered documents which form the title-deeds for our self-acquired properties,.........as equitable mortgage for the amount due under the aforesaid promissory note." *Held* that the letter did not create a charge in itself but only evidenced a completed prior charge and was therefore admissible in evidence without registration.

S. Rangaswami Iyengar for Appellant.

R. Kuppusami Iyer and *T. M. Ramasami Iyer* for Respondents.

Oldfield and Sadasiva Aiyar, JJ.
1918, *February* 5.

C. M. A. No. 327 of 1916.

Provincial Insolvency Act, Ss. 46 and 47—Appeal—Memorandum of objections, right to present—Memorandum of objections, if can be heard when appeal has been dismissed as presented out of time.

Their Lordships referred the following questions to a Full Bench.

1. Whether a memorandum of objections can be presented in an appeal preferred under S. 46 of the Provincial Insolvency Act.

2. Whether a memorandum of objections can be heard when the appeal itself has been dismissed as barred by limitation.

K. Srinivasa Iyengar and *K. Bhashyam Iyengar* for Appellants.

Hon'ble T. Rangachariar, B. Sitarama Row and *A. Krishnaswami Iyer* for Respondents.

Oldfield and Sadasiva Iyer, JJ.
1918, *February* 5.

L. P. A. Nos. 156 of 1917.

Madras Estates Land Act, S. 8 (1), (2), and Exception—Acquisition of entire Kudivaram interest by owner of a fractional share of the Melwaram in an Inam Village—Suit for rent—Forum—Civil or Revenue Court.

Where the owner of a fractional share of the Melwaram in an Inam village who had subsequently acquired the entire occupancy right in the village, brought a suit for rent from a person to whom he

had let the land, *held* that the suit was cognizable only by the Revenue Court.

K. V. Sesha Iyengar for *K. N. Aiya Iyer* for Appellant.

N. Chandrasekhara Iyer for Respondent.

Bakewell and Krishnan, JJ.
1918, *February* 5.

S. A. No. 1428 of 1916.

Civil Procedure Code, S. 73—Rateable distribution—"Same judgment-debtor"—Assets brought into Court in execution of decree against several judgment-debtors—Rival decree-holder holding decree against one of the judgment-debtors—Fund available for distribution—Execution application, pendency of, at the time when assets brought into Court—Dismissal of application and restoration, before order for distribution is made—Effect of.

Plaintiff obtained a decree against defendants 3 and 4, members of a joint Hindu family of which the third defendant was manager and in execution of his decree brought to sale their properties. The purchaser deposited the money in Court. The first defendant who had obtained a decree against the 3rd defendant only, had applied for execution at the time when the assets were brought in. Subsequently the execution application of the first defendant was dismissed for default of prosecution but again restored before the distribution of assets. The Courts below held that the first defendant having obtained a decree against the 3rd defendant who was the manager, was entitled to rateable distribution of the whole of the assets held by the Court. *Held* that the first defendant was entitled to rateable distribution only of the 3rd defendant's half share of the assets in Court since the third defendant was the only person who could be said to be the "judgment-debtor" of the first defendant within the meaning of S. 73 of the Civil Procedure Code. *Held*, further, that the intermediate dismissal and restoration of the execution application of the first defendant did not affect his right to rateable distribution.

K. R. Guruswami Iyer for Appellant.

T. M. Krishnaswami Iyer for Respondent.

Ayling and Seshagiri Aiyar, JJ.
1918, *February* 5.

A. S. No. 78 of 1917.

Specific Relief Act, S. 42—Hindu Law—Widow of deceased coparcener, setting up a will giving her authority to adopt—Suit for declaration that will is invalid and not genuine.

Where the widow of a deceased co-parcener set up a will of her husband under which he purported to give her authority to adopt and the surviving co-parcener sued for a declaration that the will was not

genuine, *held* that the suit was maintainable. The setting up of a false will by the widow containing an authority to adopt cast a cloud on the title of the surviving co-parcener and he was entitled to have it removed by suing for a declaration that the will was false. I. L. R. 38 M. 1162 Relied on.

P. Narayanamurthi for Appellant.

B. Narasimha Row and *C. Rama Row* for Respondents.

Wallis, C. J. and Spencer, J. 1918, *February* 5. — A. S. 238 of 1916.

C. P. Code, S. 66—Properties purchased in Court auction by Manager of a Hindu Joint family or partner of a firm with family or partnership funds in his own name—Suit by other members for partition, if barred by S. 66.

Where the manager of a Joint Hindu family or a partner of a firm purchases properties in Court sale in his own name with the joint family or partnership funds, a suit for partition of that property by the other members of the family or partnership is not barred by S. 66 of the Civil Procedure Code.

37 All. 545 (P. C.) followed.

R. Srinivasa Iyengar for Appellant.

K. R. Rangaswami Iyengar and *C. Veeraragava Iyer* for Respondents.

Oldfield and Sadasiva Aiyar, JJ. 1918, *February* 5. — L. P. A. No. 120 of 1917.

Letters Patent—Appeal under—Maintainability—Civil Procedure Code O. 41 R. 11—Appeal against order of remand in case posted under—Rejection by Judge of High Court—Appeal.

An appeal lies under the Letters Patent against order of a Judge of the High Court dismissing an appeal against an order of remand passed in a case under O. 41 R. 11, Civil Procedure Code.

P. R. Ganapati Aiyar for *T. V. Venkatarama Aiyar, (T. R. Vaidiyanatha Aiyar with him)* for Appellant.

S. Ramaswami Aiyar for *T. V. Muthukrishna Aiyar* for Respondent.

Bakewell and Krishnan, JJ. 1918, *February* 6. — S. A. No. 173 of 1917.

Limitation Act, Art. 49 *and* 145*—Suit for recovery of pledge—Demand and refusal—Article applicable—Art.* 49 *or* **145.**

A suit to recover property pledged is governed by Art. 145 and not Art. 49, though there has been a demand and refusal.

33 M. 56 followed.

K. S. Aravamutha Iyengar for *Hon'ble B. N. Sarma* for the Appellants.

K. V. Venkatasubramania Iyer for *B. Narasimha Rao* for Respondents.

Abdur Rahim and Napier, JJ. 1918, *February* 6. — S. A. No. 1800 of 1916.

Roman Catholic Church—Right of entry on special occasions as marriage etc.—Custom of levying a small fee before admission, if reasonable and not opposed to public policy.

Where the plaintiff brought a suit for a declaration that he was entitled to enter a certain Roman Catholic Church on all occasions and for damages for obstruction by the defendants, who had the key of the Church and who refused him admission when he sought to enter the Church with a large party on the occasion of his daughter's marriage, unless he paid a small fee and it was proved that it was customary to levy such fee on special occasions and that such collections were utilised for the up-keep of the Church

Held, that the custom was a reasonable one and not opposed to public policy.

M. D. Devadoss for Appellant,

N. Rajagopalachari for Respondents.

Chief Justice and Spencer, J. 1918, *February* 14. — S. A. No. 25 of 1912.

Foreign Judgment—Suit on—Facts showing absence of jurisdiction in foreign Court—Fact that defendant had not submitted to it—Jurisdiction—Allegation and proof of—Onus.

In a suit on a foreign judgment the defendant must allege and prove facts which show that the foreign court had no jurisdiction over the case in which the judgment sued on was pronounced. One of such facts is that the defendant had not submitted to the jurisdiction of the foreign Court. It is not for the plaintiff to allege and prove such facts.

A. Krishnaswami Aiyar and *A. Venkatarayaliah* for Appellant.

C. V. Venkatachariar for Respondents.

Oldfield and Sadasiva Iyer, JJ. 1918, February 14. } L. P. A. S. Nos. 133 and 134 of 1917 and C. R. P. No. 587 of 1917.

Guardian and Wards Act, S. 41, Cls. 2 (c) and 3—Death of minor —Order directing guardian to deliver property to one of several claimants, if without jurisdiction.

Where on the death of a minor, the Court directed the guardian of the minor's property to deliver the property to one of several claimants, and it was contended that the order was passed without jurisdiction, as the Guardian and Wards Act made no provision for guardianship ceasing on the death of the minor. *Held,* that the Dt. Judge had jurisdiction to pass such an order.

Per Sadasiva Iyer, J.—S. 41 Cl. 2 (c) which says that guardianship comes to an end by the ward ceasing to be a minor may be extended to cover the present case, for by death a person ceases to be a minor.

S. Muthiah Mudaliar and *T. V. Gopalaswami Mudaliar* for Appellants and Petitioner.

T. Narasimha Iyengar for Respondent.

Oldfield and Sadasiva Aiyar, JJ. 1918, February 14. } S. A. No. 127 of 1917.

Hindu Law—Joint family—Junior member mortgages whole family property—Loan raised lent to a stranger with whom the junior member enters into a trading partnership—Suit by family to recover such money—Whether affirmation of mortgage by family.

A junior member of a Hindu joint family mortgaged the whole family property, and lent the money so raised as his share of the capital to a stranger with whom he entered into a trading partnership. Subsequently all the co-parceners sued the stranger to recover the money, and the suit was compromised and satisfaction recorded. Now in a suit by the mortgagee, it was contended that the suit and the subsequent compromise and satisfaction of claim constituted an affirmation of the mortgage by the family and that it was not open to a person to approbate and reprobate the same transaction.

Held, that the aforesaid acts did not constitute an affirmation of the mortgage by the family, and that the whole family property was not liable on the mortgage.

C. S. Venkatachariar, for Appellant.

P. Chenchiah, for *T. Prakasam,* for Respondents.

Bakewell and Krishnan, JJ.
1918, February 15.

S. A. No. 227 of 1917.

Provincial Insolvency Act, S. 47—Applicability—Sale by Official Reviever—Purchaser's application to be put in possession—Jurisdiction of District Court—Order dispossessing party in possession—Suit by him for declaration of invalidity of order and for injunction restraining purchaser from enforcing same—Maintainability.

A purchaser of an insolvent's property at a sale by the Official Receiver has no right to apply to the District Court to be put in possession of the property under S. 47 of the Provincial Insolvency Act and any order made by the District Court under that Section dispossessing a party in possession is void and a suit lies at the instance of the latter for a declaration that the said order is void and for an injunction restraining the purchaser from enforcing the order.

B. Narasimha Rao and *D. Appa Rao* for Appellants.

C. Rama Rao for *P. Narayanamurti* for Respondents.

Phillips, J.
1918, February 15.

Crl. R. C. 564 of 1917.

Abkari Act, S. 55, cl. (a)—Effect—Intoxicating drug—Possession of, when illegal—Distinction between Government ganja and non-Government ganja.

S. 55, cl. (a) of the Akbari Act renders illegal the possession of an intoxicating drug only where it exceeds the quantity specified in the Rules framed by Government under the Act and draws no distinction between Government ganja and non-Government ganja.

B. Narasimha Rao for Petitioner.

P. R. Narayanaswami Aiyar for Public Prosecutor.

Bakewell and Krishnan, JJ.
1918, February 15.

S. A. No. 1561 of 1916.

Civil Procedure Code, O. 21 R. 63, O. 38 R. 8—Attachment before judgment-order on claim petition, whether governed by the provisions of Order 21 Rule 63.

In this case their Lordships referred to the Full Bench the question whether the orders on claim petitions in cases of attachment before judgment are governed by the provisions of O 21 R. 63.

C. V. Anantakrishna Aiyar for the Appellant.

C. Rama Rao for *P. Narayanamurthi* for the Respondent.

Phillips J.
1918, February 15.

Cr. R. C. No. 632 of 1917.

Practice—Criminal revision by complainants.

On a criminal revision preferred by the complainant against an order of an Appellate Magistrate quashing the conviction and sentence of the 1st court and ordering the re-trial of the accused, *held*, the rule that the High Court will not entertain a revision petition against an order of acquittal at the instance of a private party extends also to cases of the kind in question.

Dr. S. Swaminadhan for the complainant-petitioner.

T. M. Krishnaswamy Aiyar, for the Accused.

Oldfield and Sadasiva Aiyar, JJ. 1918, February 18. — C. M. A. No. 271 of 1917.

Provincial Insolvency Act, S. 16 (6) 36 fraudulent alienation by insolvent—Avoidance of—Period of 2 years in S. 36 dates the date of the petition in the insolvency and not from the date of the order of adjudication.

The two years period mentioned in S. 36 of the Provincial Insolvency Act is to be calculated from the date of the presentation of the petition in insolvency, by reading S. 36 with S. 16 (6) of the Act.

42 C. p. 289. 2 P. L. J. p. 235, doubted.

K. S. Ganesa Aiyar for Appellants.

T. M. Krishnaswamy Aiyar, *K. V. Sesha Aiyangar* for *S. S. Ramachandra Aiyar* for Respondents.

Abdur Rahim and Napier, JJ. 1918, February 19. — S. A. No. 390 of 1917.

Hindu law—Suit for partition by minor co-parcener—Discretion of Court to decree partition—Benefit of minor—Marriage by father of second wife, while mother of minor is alive—Likelihood of diminution of share by birth of children to second wife—Whether sufficient grounds for decreeing partition.

Where the maternal grand-father of a minor brought a suit for a partition against the minor's father on the ground that the father had married a second wife, held, (1) the matter is one of discretion vested in the courts to decree a minor's suit for partition or not and that that discretion must be exercised in favour of partition only when obvious benefit from the minor is made out.

(2) It is always the general presumption that the continuance of the joint family is beneficial to the minor co-parceners ;

(3) possible future births in the family and the consequent decrease of the minor's share are not considerations to be entertained in the exercise of the discretion.

Case law of the question reviewed.

31 Bom. 373, (P.C.) and 3 M. H. C. R. 94 followed.

L. A. Govindaraghava Iyer and *T. V. Muthukrishna Iyer*, for Appellants.

T. M. Krishnaswami Iyer and *V. Ganapathi Iyer*, for *A. Krishnaswami Iyer*, for Respondent.

Phillips and Krishnan, JJ.
1918, February 20. } S. A. No. 130 of 1917.

Limitation Act, Art. 10—Sale of property subject to an othi mortgage—Direction to vendee to pay off othi—Pre-emption—Limitation—Starting point.

Where a person owning property subject to an othi mortgage sold the same to a stranger directing him to pay off the *othi* out of the purchase-money reserved with him for the purpose and the othidar brought a suit for pre-emption, *held* that the case fell within the latter portion of the third column of Art. 10 of the Limitation Act and that limitation began to run from the date of the registration of the sale deed.

I. L. R. 9 A. 234 followed.

G. S. Ramachandra Iyer for Appellant.

K. P. Lakshman Rao for Respondent.

Ayling, Coutts Trotter and Seshagiri Iyer, JJ.
1918, February 20. } A. S. No. 343 of 1916.

Partnership—Acknowledgment of liability—Express authority if necessary—Limitation Act, Ss. 19 *and* 21 (2).

Even in the absence of direct evidence that a partner has authorised another partner to make acknowledgments or payments saving limitation on his behalf, such authority can be inferred from other circumstances such as the nature and the usual course of business and the position of the other partners in the business.

I. L. R. 32 M. 421 ; I. L. R. 35 M. 142 Overruled.

V. Ramadoss, for Appellant.

T. Ramachandra Rao, for Respondent.

Ayling, Coutts Trotter, and Seshagiri Aiyar, JJ.
1918, February 20. } Full Bench. A. S. No. 84 of 1915.

Hindu Law—Guardianship—Manager of a joint family—Power to appoint by will a guardian of the properties of minor coparcener's joint family property—All members minors.

The father or manager of a joint Hindu family consisting of himself and minor co-parceners has no power to appoint by will a guardian for the properties of the minor coparceners.

K. Srinivasa Aiyangar, C. Krishnamachariar, R. Srinivasa Aiyangar for the Appellants.

T. R. Ramachandra Aiyar, with S. T. Srinivasagopalachariar, T. Rangachariar, N. M. Malim Saheb, T. R. Krishnaswamy Aiyar, G. S. Ramachandra Aiyar and *V. Narasimha Aiyangar*, for the Respondents.

Oldfield and
Sadasiva Aiyar, JJ.
1918 February 5.

L. P. A. No. 156 of 1917.

Madras Estates Land Act, S. 8—Exception—Applicability—Acquisition of Kudivaram interest by some of the Inamdars only—Effect.

The exception to S. 8 of the Estates Land Act applies only to a case in which all the inamdars acquire the kudivaram interest in the land. Where only some of the Inamdars acquired the kudivaram interest in the land, *held* that the land did not cease to be part of an Estate.

K. V. Seshayyangar and *A. Narayanaswami Aiyar* for *K. N. Aiya Aiyar* for Appellant.

N. Chandrasekhara Aiyar (*B. C. Seshachala Aiyar* with him for *A. Krishnaswami Aiyar* for Respondent.

Oldfield and
Sadasiva Aiyar, JJ.
1918 February 5.

C. M. A. No. 327 of 1916.

Provincial Insolvency Act—Appeal under—Memo. of objections in—Maintainability—Appeal dismissed as being out of time—Effect—Practice.

In this case their Lordships referred to the Full Bench the questions.

Whether in an appeal under the Provincial Insolvency Act, a memorandum of objections can be preferred at all; and

Whether when such an appeal is dismissed as having been filed out of time, the respondent is entitled to have his memo. of objections heard.

K. Srinivasa Aiyangar and *K. Bhashyam* for Appellant.

A. Krishnaswami Aiyar, *A. Venkatarayaliah* and *K. S. Desikachariar* for Respondent.

Ayling and
Seshagiri Aiyar, JJ.
1918 February 5.

A. S. No. 78 of 1917.

Sp. R. Act, S. 42—Hindu Law—Widow—Authority to adopt—Fabrication—Suit by reversioner for declaration that authority is not genuine—Maintainability.

A reversioner can sue for a declaration that an authority to adopt put forward by a Hindu widow is not genuine.

35 M. 592 not followed.

P. Somasundaram and *K. Ramamurti* for Appellant.

B. Narasimha Rao and *C. Rama Rao* for Respondent.

Ayling and Seshagiri Aiyar, JJ.
1918, February 20.

A. S. No. 149 of 1917.

Registration Act, S. 77—Suit under—Evidence—Depositions of witnesses examined before Registering Officer—Relevancy—Consent of parties—Effect.

In a suit under S. 77 of the Registration Act, depositions of witnesses examined before the Registering Officer in prior proceedings for the registration of the document in question are not relevant evidence except in cases falling under S. 33 of the Evidence Act. And the fact that the parties to the suit consent to treat such depositions as relevant evidence will not make them relevant.

38 M. 160 not followed.

K. V. Venkatasubbramaniya Ayyar for *Dr. S. Swaminathan* for Appellant.

T. V. Muthukrishna Iyar and *N. Muthuswami Aiyar* for Respondent.

Ayling and Seshagiri Aiyar, JJ.
1918, February 21.

A. S. No. 148 of 1916.

Reformation—Law of, if can be availed of by Crown—Land Encroachment Act III of 1905—Applicability—Occupation begun before but continued after Act—Back penal assessment—Levy of—Legality.

The law of reformation which prevails against accretion as laid down in *Lopus's Case* (13 M. I. A. 464) cannot be availed of by the Crown.

3 C. L. J. 316 foll.

The Land Encroachment Act III of 1905 applies to occupations which began before but continued after the passing of the Act.

Back penal assessment can be levied under the Act (Land Encroachment Act.)

Per Ayling, J.—Back penal assessment can be levied according to the actual period of occupation both before and after the passing of the Act.

Per Seshagiri Aiyar, J.—Such assessment can be levied only for the period of occupation after the Act.

The Hon. The Advocate-General (*K. Raja Aiyar* with him) for Appellant.

Acting Government Pleader, (*K. S. Krishnaswami Aiyangar* with him for Respondent.

Phillips and Krishnan, JJ.
1918, February 21.

S. A. No. 1615 of 1917.

Award—Effect—If and when operates as conveyance.

An award directing a lease of immoveable property to be given by A to B does not of itself confer on B the interest of a lessee in such property.

L. A. Govindaraghavaiyar and *K. N. Kumaraswami Aiyar* for Appellant.

S. T. Srinivasagopalachariar for Respondent.

Bakewell, J.
1918, February 21. } C. M. P. No. 182 of 1918.

Vizagapatam Agency Rules, Rr. 20, 21, 31—Petition to review the Agent's decision in appeal—Power to stay execution of Agent's order—Agent's Court whether subject to the Appellate Jurisdiction of the High Court—Government of India Act, S. 107.

The High Court is not a Court having an Appellate Jurisdiction within the meaning of S. 107 of the Government of India Act, over the Agent's Court. Rule 20 of the Agency rules does not confer Appellate Jurisdiction on the High Court.

23 Mad. p. 329 foll.

The High Court has no power to stay execution of the Agent's order pending a petition to review the Agent's decision under R. 20.

P. Narayanamurti for the Petitioner.

T. R. Venkatarama Sastri for the Respondent.

Phillips and Krishnan, JJ.
1918, February 22. } S. A. No. 279 of 1917.

Decree—Satisfaction of out of court—Payment not certified to court execution application by decree-holder dismissed for default—second execution petition also dismissed—Suit by judgment-debtor for damages or recovery of money paid towards decree—Cause of action, if any—Limitation Act, Art. 115.

A decree passed in the year 1907 was satisfied out of court, but payment was not certified to Court. The decree-holder put in an execution petition in 1910, and it was dismissed for default. A second execution application in 1913 was also dismissed. The present suit was brought in 1914 by the judgment-debtor for damages or for recovery of money paid by him towards the decree. It was contended that no action lay, in as such as no loss has been incurred by the plaintiff on account or the execution petitions and that even if an action lay, it was barred under Art. 62 of the Limitation Act.

Held that the presentation of the execution petitions was a breach of the implied promise to certify satisfaction of the decree and that a suit in damages lay for such breach also, that it was a continuing breach and that the application in 1913 gave a fresh starting point for limitation, the article applicable being Art. 115.

K. R. Rangasami Iyengar for Appellant.

T. L. Venkatarama Iyer for Respondents.

Phillips and Krishnan, JJ
1918, February 22.

S. A. No. 331 of 1917 and C. M. A. No. 61 of 1917.

Malabar Tenant's Improvements Act, Sec. 3—land leased for cocoanut plantation—building erected for carrying on fish oil press—whether improvement.

Where, on land leased for cocoanut plantation, the tenant erected a building for carrying on a fish-oil press.

Held that the fish oil press was not consistent with the character of the holding and that a building erected for such purpose was not an improvement, for which the landlord was liable to pay compensation.

K. P. M. Menon for Appellant.

Hon. T. Richmond for Respondent.

Wallis C. J. and Spencer J.
1918, February 22.

O. S. A. No. 63 of 1916.

Railways Act, S. 77.—Delivery of goods by Railway Company to person entitled to delivery without calling back railway receipts —receipts subsequently pledged to plaintiff—Discovery by plaintiff after more than six months that goods had been delivered—Suit against company for recovery of value of goods, if lies—Railway receipts how far documents of title to goods.

A Railway company delivered goods to the person entitled to take delivery without calling back the railway receipts. The receipts were subsequently pledged by such person to the plaintiff. More than six months after delivery, the plaintiff learned that the goods had already been delivered to his pledgor. In a suit by him against the Railway Company for the recovery of the va lue of the goods.

Held that the suit was barred by Sec. 77 of the Railways Act.

A Railway receipt like a bill of lading is a document of title to goods only till delivery is made to persons entitled to take delivery.

The note in the receipt which says that the goods will not be delivered unless the receipt be produced, is only for the protection of the Railway. It does not hold out a right to the Mercantile world as against the Railway to sue for loss that may be caused by not calling back the receipts, when delivering the goods.

D. Chamier and *R. N. Iyengar* instructed by *Grant and Greatorex* for Appellant.

V. V. Srinivsa Iyengar and *T. G. Raghavachari* for Respondent.

Bakewell, J.
1918, February 25. } C. R. P. Nos. 280, 281 & 282 of 1917.

Provincial Small Cause Courts Act, Sch. II, Art. 11—Applicability—Malabar tarwad—Suit against Karnavan of tawazhi by senior members of its sub-tawazhis for their share of income of tarwad properties under family karar—Small Cause Court—Jurisdiction.

A suit by the senior members of the sub-tawazhis of a tawazhi against the karnavan of the tawazhi for their share of the income of the immoveable properties of the tarwad in virtue of a family karar falls under Art. 11, Sch. II of the Provincial Small Cause Courts and is not cognizable by a Small Cause Court.

13 M. L J. 499 followed.

K. P. M. Menon for Petitioner.

P. S. Narayanaswami Aiyar and E. Ramaswami Aiyar for Respondents.

Oldfield and
Sadasiva Aiyar, JJ.
1918, February 25. } S. A. No. 318 of 1917.

Deed—Construction—Hindu Law—Partition deed—Rights under—Deed between father, his 3 sons and widow of predeceased son allotting properties to each with absolute rights—Estate taken by widow—Family divided in status even during lifetime of deceased son—Effect.

Where by a partition-deed to which a Hindu father, his 3 sons and the widow of another predeceased son were parties, properties were allotted to each of them with absolute rights of gift, sale, etc., and it was provided that in case any of the parties to the deed alienated the properties allotted to him or her the others should not question the alienation claiming to be heirs or reversioners or in any other right accruing to them after the date of the deed: *held*, notwithstanding the finding that the family had become divided in status even during the lifetime of the predeceased son, that his widow took the properties allotted to her with absolute rights.

P. Narayanamurti for Appellant.

B. Narasimha Rao for Respondents.

Phillips and
Krishnan, JJ.
1918, February 26. } S. A. No. 497 of 1917.

Award—Validity—Objection to—Sustainability in appeal against decision on merits—Agreement to abide by decision of majority of arbitrators—Award signed by majority only—Validity—Minority dissenting but not signing award of majority nor submitting separate award—Effect.

Where a Court set aside an award of arbitrators and decided on the merits, the Court of appeal can, on appeal from the final decree, enquire into the propriety or otherwise of the order setting aside the award.

31 M. 345 followed.

Where in a case in which the parties to a reference agreed to abide by the decision of the majority of the arbitrators appointed, *held*, that an award passed by the majority and signed and submitted by them to the Court was valid notwithstanding that, though the minority who did not agree, did not sign the said award or submit a separate one.

V. S. Govindachariar and *V. S. Kallabhiran Aiyangar* for Appellant.

K. V. Venkatasubramani Iyer for *Dr. S. Swaminathan* for Respondents.

Phillips and Krishnan, JJ.
1918, February 26. } S. A. No. 92 & 117 of 1917.

Jurisdiction—Suit for general average against vessel and consignees of goods—Civil Courts—Foreign Court — Submission to jurisdiction—Pleading to jurisdiction and to merits—Effect.

A suit for general average against a Native Coasting Vessel and the consignees of goods saved on account of the jettison of plaintiff's goods in the High-seas when the ship was in danger is maintainable at the place of destination and is within the jurisdiction of the ordinary Civil Courts.

Held, that where in a suit instituted in a Foreign Court against a non-resident foreigner, the latter pleaded to the merits in addition to his pleading to the jurisdiction of the Court, *held* that he should be deemed to have submitted to its jurisdiction.

A. Sundaram, T. R. Ramachandraiyar, T. R. Krishnaswami Aiyar and *N. A. Krishnaiyar* for Appellants.

Hon. T. Richmond for Respondents.

Phillips and Krishnan, JJ.
1918, February 26.

S. A. No. 480 of 1917.

C. P. Code—Sch. II S. 16—Award of arbitrators covering matters not in dispute—decree embodying as much of the award as related to matters in dispute—appeal from, if lies.

A dispute about certain lands was referred to arbitration, after institution of suit. The award included also lands not in dispute. The Dt. Munsif passed a decree embodying so much of the award as related to the lands in dispute. On appeal the Lower Court held that no appeal lay. In second appeal it was contended that the award was not severable and that the Lower Court ought to have gone into the question whether or not the award was severable before dismissing the appeal on the preliminary ground that no appeal lay.

Held, that S. 16 of Sch. II of the Civil Procedure Code barred an appeal from such decree.

T. M. Krishnasami Iyer and P. N. Appusami Iyer for Appellant.
R. Kuppusami Iyer and V. Pattabhirama Iyer for Respondent.

Oldfield and Sadasiva Iyer, JJ.
1918, February 27.

C. M. A. No. 161 of 1917.

Civil Procedure Code, Ss. 94, 95 and 104 (g) Attachment before judgment, applied for on sufficient grounds—Cancellation of, on hearing opposite party—Right to compensation—Order refusing compensation, Appealability of.

Where on the application of a plaintiff, an attachment before judgment was ordered and attachment was effected but subsequently on hearing the defendant the Court cancelled the attachment, the defendant is still entitled to compensation under S. 95 of the C. P. Code. It is not necessary that the attachment should have continued throughout the suit, in order to entitle the defendant to compensation. An order refusing compensation is appealable under S. 104 (g) of the C. P. Code.

I. L. R. 39 M. 907 Relied on.

T. Eroman Unni for C. V. Ananthakrishna Iyer for Appellant.
T. R. Venkatarama Sastri for Respondent.

Phillips and Krishnan, JJ.
1918, February 28.

S. A. No. 484 of 1917.

Hindu Law—Widow— Conversion to Mahomedanism and remarriage thereafter—Forfeiture of right to properties inherited from Hindu husband—Hindu Widows' Remarriage Act (XV of 1856)—Effect of.

Their Lordships referred to a Full Bench the question whether a Hindu widow in possession of her husband's estate who becomes a convert to Islam and then marries a Mahomedan, loses her right to the properties inherited by her from her Hindu husband.

35 A. 466, 5 C. 775, 19 C. 289, 23 M. L. T. 81 Referred to.

M. O. Parthasarathy Iyengar for Appellant.

T. V. Subba Row for Respondent.

Oldfield and Bakewell, JJ. 1918, March 5. — C. M. A. No. 328 of 1917.

C. P. Code—Or. 21 R. 72—Execution sale—Application for setting aside, on ground of absence of leave to bid—Parties—Decree-holder if a necessary party.

The decree-holder is a necessary party to a proceeding to set aside a sale under Or. 21 R. 72 of the Code and an application put in without making him a party is not maintainable.

A. Swaminatha Iyer for Appellant.

C. V. Ananthakrishnaiyar and *P. S. Narayanaswami Aiyar* for Respondent.

Phillips and Krishnan, JJ. 1918, March 5. — S. A. No. 605 of 1917.

Contract Act, S. 30—Scope of—Wager—Deposit to cover amount of—Suit for recovery of—Maintainability—Deposit with stranger—Deposit with contracting party—Appropriation of amount of deposit to differences—Effect.

A person who deposits money with a view to cover the amount of a wager can recover the amount before it is appropriated as much in a case where the deposit is made with one of the contracting parties as in a case where it is made with a stranger. Such appropriation need not be expressed. Where the deposit is made with one of the contracting parties it is enough if, after the event, he asserts his right to set off the amount deposited as against the differences.

Per Phillips, J.—Quære whether S. 30 of the Contract Act is not wide enough to cover a suit for the recovery of the deposit from the shareholder or from one of the contracting parties apart from any question of appropriation.

A. Krishnaswami Aiyar (*K. C. Gopaladesikachariar* with him) for Appellant.

P. Narayanamurti (*K. Kamanna* with him) for Respondents.

Phillips and Krishnan, JJ. 1918, March 6. S. A. No. 843 of 1917.

C. P. Code, S. 102—Second Appeal—Suit of small cause nature —Suit for tree-tax in respect of pre-settlement Inam—Claim based on prescription or on contract.

A suit for the recovery of tree-tax claimed in respect of a pre-settlement Inam is, whether the claim is based on prescription or on contract, a suit of a small cause nature within S. 102 of the Code of Civil Procedure and where the amount claimed is less than Rs. 500, no second appeal lies in such a suit.

K. Raja Aiyar, for Appellant.

P. Narayanamurti, for Respondent.

Phillips and Krishnan, JJ. 1918, March 6. S. A. No. 603 of 1917.

Limitation Act, Art. 53—Suit for price of paddy delivered—Price to be fixed subsequent to delivery according to agreement—Credit implied till fixing of price—Limitation.

Where paddy was sold and delivered to the purchaser, and the price was agreed to be fixed at a subsequent date.

Held, that a suit for the recovery of the price was governed by Art. 53 of the Limitation Act as credit was to be implied till the fixing of the price.

C. V. Ananthakrishna Iyer for Appellant.

K. Bhashyam Iyengar and *T. M. Ramaswamy Iyer* for *A. Krishnaswami Iyer* for Respondents.

Phillips and Krishnan, JJ. 1918, March 7. S. A. No. 893 of 1917.

Specific Relief Act, S. 39—Suit to cancel a mortgage-deed—limitation—Starting point.

In a suit to cancel a mortgage-deed on the ground of undue influence, limitation runs from the date of registration, for till registration the executant cannot have a reasonable apprehension, that it will be enforced against him.

M. D. Devadoss for Appellant.

M. B. Doraisami Iyengar for Respondent.

Ayling and Seshagiri Aiyar, JJ. 1918, March 7. A. S. No. 405 of 1915.

Hindu Law—Widow—Alienation of part of estate for purchase of other properties—Purchase of other properties—Reversioner impeaching validity of widow's alienation—Right to claim alienated and

purchased properties—Purchase with income of husband's estate—Part of purchased property owned by husband—Accretion—Presumption—Family—Settlement—Validity—Test—Inquiry into belief of party as to validity of opponent's claim—Reversioner—Authority to widow to alienate—Gift of part of estate to reversioner himself—Validity.

Where a Hindu widow sells part of the estate of her husband with a view to purchase other properties and does purchase them with the sale proceeds, it is not open to the reversioner in case he impeaches the validity of the alienation by the widow, to claim both the alienated and the purchased properties. He must elect to recover either and is entitled to recover either.

In a case in which a Hindu widow purchases with the income of her husband's estate one half of an item of property, the other half of which belonged to her husband, the presumption is that the moiety purchased is an accretion to the estate.

Where in a case in which the presumptive reversioner conferred a power of alienation on a Hindu widow with regard to her husband's properties in her possession and the widow made a gift of some of the properties to the reversioner himself, *held* the transaction could not be supported on any theory of a surrender and a regrant.

In judging of the validity of a family settlement, it is competent to the Court to go into the question whether or not some of the parties to the settlement believed in the honesty of the claim of their opponents.

Abdur Rahim and Napier, JJ. 1918, March 8. — S. A. No. 128 of 1917.

Transfer of Property Act, S. 130—Accounts settled between debtor and creditor—Sum found due directed to be collected from debtor's debtor and debited—Direction if valid assignment of debt.

On accounts finally settled between a debtor and creditor a sum of rupees six hundred and odd was found due. This sum was entered in the debit and the whole debt was thus cleared off. Against the debit entry was written "By way of direction to collect Rs. 600 and odd from S." (a debtor of the debtor.) This final settlement of accounts was signed by the debtor. The question was whether the direction constituted a valid assignment of the debt. It was contended that it was not as there were no words of transfer and, that it was a mere order for collection.

Held, that there was the intention to transfer the debt to the creditor and that it was a valid assignment.

T. R. Krishnasami Iyer, for Appellant.

T. V. Gopalaswami Mudaliar, for Respondent.

The Chief Justice, Sadasiva Iyer and Spencer, JJ.
1918, March 4.

Full Bench.

S. A. No. 1177 of 1916.

Malabar Law—Karar—Karnavan — if de jure Karnavan and removeable by court in a suit by junior members.

Under a Karar to which all the members of the Tarwad were parties, the Karnavan relinquished his rights of managership and the next senior member was appointed as the Karnavan. In a suit by the junior members to remove the Karnavan for misconduct, *held* that the Karnavan appointed by the Karar was the *de jure* Karnavan and could be removed by court.

C. V. Ananthakrishna Aiyar for Appellant.

T. R. Ramachandra Aiyar and *A. Sivarama Menon* for Respondent.

Ayling, Oldfield, Sadasiva Aiyar, Coutts Trotter and Seshagiri Aiyar, JJ.
1918, March 8.

A. S. No. 317 of 1916.

Hindu Law—Widow—Alienation—Suit for declaration of invalidity—Suit by remote reversioner—Limitation—Starting point—Res judicata—Decision in suit by one reversioner—Effect on others.

A suit by a reversioner instituted within 6 years of the date of his birth but more than 12 years after the date of an alienation by the widow of the last male owner for a declaration of its invalidity is barred in a case in which the presumptive reversioner at the date of the alienation failed to institute such a suit within the period allowed therefor. The cause of action for such a suit is the same for all reversioners, presumptive and remote, born and unborn, and it accrues on the date of the alienation in question.

Semble, the decision in a suit brought by one reversioner is a bar to a fresh suit for the same relief brought by another.

V. Ramadoss for Appellants.

P. Narayanamurti for Respondents.

Oldfield and Sadasiva Aiyar, JJ.
1918, March 8.

C. M. S. A. No. 99 of 1917.

Malabar Compensation for Tenants' Improvements Act, S. 6—Redemption suit—Decree in—Nature of—Proceedings subsequent to

decree—Nature of—Order in—Appeal—Civil Procedure Code, O. 34—Provisions of—Applicability to decrees under Malabar Compensation for Tenants' Improvements Act.

Under S. 6 of the Malabar Compensation for Tenants' Improvements Act I of 1900 the only decree that can be passed in a suit for redemption is a decree in ejectment as therein provided. All proceedings subsequent to such decree are proceedings in execution and a miscellaneous appeal lies from any order after such decree varying or refusing to vary the amount due for improvements under cl. (3).

The special procedure prescribed by S. 6 has not been abrogated by O. 34 of the Code of Civil Procedure as such a procedure is saved by S. 4 thereof.

T. Eroman Unni for Appellant.

P. V. Parameswaraiyar for Respondent.

Oldfield and Sadasiva Iyer, JJ.
1918, March 8.

C. M. S. A. 51 of 1917.

Civil Procedure Code, O. 21, R. 93—Bar of suit for recovery of purchase money.

It is not open to an auction purchaser, when he finds that the judgment-debtor had no saleable interest in the property sold, to institute a suit for recovery of the purchase money. The only remedy is by an application under O. 21, R. 93, C. P. Code.

M. S. Vaithinatha Iyer, for Appellant.

J. V. Venkatarama Iyer, for Respondent.

[Cf. 40 M. 1009 ; 23 M. L. J. 487 ; 35 B 29, 31.]

The Chief Justice and Spencer, J.
1918, March 13.

O. S. A. No. 61 of 1917.

Indian Contract Act, S. 113—Sale of goods of certain denomination—Warranty that goods are merchantable, if implied in the Contract—English and Indian law—Inspection of outer cover—Damage of goods inside, if discoverable.

The defendant agreed to sell yarn known as 'Hanuman black-yarn' in the market to the Plaintiff. The plaintiff took delivery of the bales at the defendant's godown in Madras and immediately sent them by Railway to Calcutta. On unpacking at Calcutta, it was found that the yarn in some of the bales had been eaten up by white ants. In a suit for damages by the plaintiff, it was contended that

according to S. 113 of the Indian Contract Act, when goods going by a certain name in the market were sold, there was only an implied warranty that the goods were of that denomination, and there was not the further warranty that they were of a merchantable quality, as was the case in English Law. It was further contended that the plaintiff had an opportunity to inspect, as the bales were delivered to him at Madras, and that reasonable diligence on his part could have discovered the damage.

Held, that the warranty that goods were in a saleable condition was implied in a contract of sale of goods by denomination, that there was no difference between the English and Indian law on the point, S. 14 of the English Sale of Goods Act being only more explicit; *Josling* v. *Kingsford* [13 C. B. N. S. 447] *Gardiner* v. *Gray* [4 Campbell 144] and *Jones* v. *Just* [L. R. 3 Q. B. 197] followed.

Further held that the inspection of the outer cover could not have revealed the damage sustained by the goods inside.

M. D. Devadoss for Appellant.

V. V. Srinivasa Iyengar for Respondent.

Sadasiva Aiyar, and Napier, JJ. 1918, March 13. — S. A. No. 672 of 1917.

Civil Procedure Code O. 21, R. 58 (proviso), R. 63—Order refusing to investigate a claim petition—Whether a suit under O. 21, R. 63 is necessary—Limitation Act, Art. 11.

In this case their Lordships referred to the Full Bench the question "whether where a court purports to make an order under the proviso to O. 21, R. 58 (2) that is to say an order refusing to investigate a claim petition such an order, comes within the operation of O. 21, R. 63."

P. Rajagopala Aiyangar for Appellant.

A. Krishnaswami Aiyar for Respondent.

Oldfield and Sadasiva Aiyar, JJ. 1918, March 13. — S. A. No. 422 of 1917.

A, B and C were jointly entitled to a particular debt, C became an insolvent and the Official Receiver sold the right, title and interest of C in favour of D. D purchased it in the belief that he was entitled to the whole debt; and subsequently collected the debt from the debtor. A brings a suit for a share of his debt against D and tries to maintain the action in the ground that he received the money to the use of A.

Held, the suit was not maintainable on that footing. Observations on the nature and scope of an action for money had and received.

M. D. Devadoss for the Appellant.

A. Krishnaswami Aiyar for Respondent.

The Chief Justice, Sadasiva Aiyar and Spencer, JJ.
1918, March 13.

S. A. No. 1465 of 1916.

Madras Act II of 1864, S. 59—Sale of Minor's property for arrears—Whether applies—Regulation 10 of 1831, S. 2—Ryotwari Estates—Whether they come under S. 2 of the Regulation.

Regulation X of 1831 applies to all estates of minors of which the Court of Wards can assume management, irrespective of the magnitude of the estate.

The word estate in S. 2 of Regulation 10 of 1831 includes also ryotwari estates.

S. 59 of Madras Act II of 1864 does not apply to Revenue Sales which are illegal as contravening S. 2 of Regulation X of 1831, which prohibits the sale of estates of minors inherited by them for arrears of revenue accruing during their minority.

The fact that the patta for a minor's properties was wrongly issued in the name of an adult does not affect the rights of the minor under Regulation X of 1831.

T. R. Venkatrama Sastri and *S. Punchapagesa Sastri* for Appellant.

S. Muthia Mudaliar for Respondent.

Sadasiva Aiyar and Napier, JJ.
1918, February 13.

S. R. No. 2768 of 1918.

Practice—Madras High Court, Rules of the Appellate Side, Rules 74 and 105—Printing deposit—Whether necessary at the time of filing a Civil Revision Petition.

In cases of Civil Revision petitions, an initial deposit for printing charges is necessary under the rules.

P. M. Srinivasa Aiyangar and *N. Vedachalam Pillai* for Petitioner.

Wallis, C. J.
and Spencer, J.
1918, March 13.

O. S A. No. 32 of 1917.

Guardian and Wards Act, Ss. 39 and 40—Appointment of testamentary guardian for the properties of minor son; such property being ancestral property—Removal of guardian—Proper remedy.

Where a Hindu testator purports to appoint a testamentary guardian for the properties of his undivided minor sons and the properties are found to be the ancestral properties of the family, the appointment of the guardian is invalid. The proper remedy for the removal of such guardian is by suit and not by proceedings under the Guardian and Wards Act.

V. V. Srinivasa Iyengar for Appellants.

V. Visvanatha Sastri for Respondents.

Wallis, C. J.
Sadasiva Aiyar and
Spencer, JJ.
1918, March 13.

(Full Bench.)
S. A. No. 1288 of 1916.

Malabar Law—Ottidar—Pre-emption—Involuntary Sale.

An ottidar has no right of pre-emption in respect of an involuntary sale of the property in execution of a decree or otherwise.

C. V. Ananthakrishna Iyer and *K. P. Ramakrishna Iyer* for Appellants.

C. Madhavan Nair for Respondent.

Phillips and
Krishnan, JJ.
1918, March 14.

S. A. No. 774 of 1917.

Malabar Law—Stanom—Kanom by Stani—Grant of melcharth by him before its expiry—Validity—Stani alive at date of expiry of period of kanom and joining as co-plaintiff—Melcharthdar's suit for redemption of kanom—Effect.

A melcharth given by a Malabar Stani before the expiry of the period of a kanom under which the properties are held is valid and binding on the stanom in a case in which the stani who granted the stanom is alive at the date of the expiry of the kanom and joins as co-plaintiff in a suit by the melcharthdar for redemption of the kanom.

C. V. Anantakrishna Aiyar (*P. V. Parameswar Aiyar with him*) for Appellant.

A. V. K. Krishna Menon and *E. Ramaswami Aiyar* for Respondent.

Wallis, C. J.
Sadasiva Aiyar and
Spencer, JJ.
1918, March 14.

(Full Bench.)
S. A. No. 1601 of 1916.

Civil Procedure Code, S. 80—Public servant acting mala-fide under colour of office—Suit against—Notice essential.

A public servant purporting to act in his official capacity is entitled to notice under S. 80 of the Civil Procedure Code even though the public servant acted *mala-fide*.

I. L. R. 7 C. 499. dissented from.

I. L. R. 24 C. 584, approved.

T. V. Venkatarama Iyer and *R. Rajagopala Iyer* for Appellant.

T. Prakasam and *P. Chenchiah* for Respondent.

Oldfield and Bakewell, JJ. *1918, March 14.* — S. A No. 371 of 1917.

Hindu Law—Reversioner—Suit to recover possession of properties alienated by widow—Decree in favour of reversioners impleaded as defendants, if proper.

Where one of the reversioners of a deceased Hindu brings a suit for recovery of his share of the properties alienated by the widow of the last owner, impleading the other reversioners as defendants along with the alienee, it is not open to the Court to pass a decree in favour of the other reversioners for their shares as well. The proper course for the other reversioners is to apply to be impleaded as co-plaintiffs and to amend the plaint accordingly or to bring a fresh suit for their shares.

B. Sitarama Rao for Appellant.

K. Y. Adiga and *K. P. Lakshman Rao* for Respondents.

Phillips and Krishnan, JJ. *1918, March 15.* — S. A. No. 771 of 1917.

Practice—Mortgage—Redemption suit—Suit mortgage held not binding on defendants—Defendants found to be in possession under another mortgage—Decree for redemption of that mortgage—Its terms in dispute—Effect.

Where in a suit against a Malabar Tarwad for redemption of a mortgage or in the alternative for recovery of possession of the suit property on the strength of title, the Court found that the suit mortgage was not binding on the tarwad but that the tarwad was in possession under another mortgage whose terms, however, were not admitted by it, *held* that plaintiff could not be given a decree for redemption of that other mortgage.

I. L. R. 30 M. 388 ; and (1916) 1 M. W. N. 171 distinguished.

T. R. Ramachandra Aiyar and *T. R. Krishnaswami Aiyar* for Appellant.

P. V. Parameswara Iyer for Respondent.

Ayling and
Coutts Trotter, JJ.
1918, March 15.

S. A. No. 315 of 1917.

C. P. Code, S. 2—Decree dismissing suit following order that suit abates—Appeal if lies.

An appeal lies from a decree dismissing a suit following upon an order that the suit abates.

P. M. Srinivasa Iyengar for Appellant.

N. S. Rangasami Iyangar for *T. Narasimha Iyengar* for Respondent.

Coutts Trotter, J.
1918, March 15.

C. S. No. 379 of 1917.

Government of India Act, S. 106 (2)—Letters Patent (1865) Cls 11 and 12—High Court—Original Civil Jurisdiction—Suit for injunction restraining Secretary of State from imposing assessment in contravention of agreement for composition.

S. 106 (2) of the Government of India Act takes away the original civil jurisdiction of the High Court in matters concerning the revenue. A suit for a declaration that an agreement for composition of income tax entered into between the plaintiff and the Collector of Madras was in force and for an injunction restraining the letter from calling for a fresh statement of the income during the period covered by the composition with a view to impose a larger assessment on the plaintiff is not cognizable by the High Court in the exercise of its ordinary original Civil jurisdiction.

Nugent Grant for plaintiff.

The Hon. The Advocate-General for Defendant.

Sadasiva Aiyar
and Napier, JJ.
1918, March 18.

C. M. P. No. 248 of 1918.

Civil Procedure Code, O. 41 Rr. 5 and 6—Appellate Court—Power of, to stay sale of property by Lower Court.

An Appellate Court has power to stay the sale of immoveable property ordered to be sold by the Lower Court in execution of a decree.

Kanniappan Chetti v. *Manikavasagam Chetti*, (1912) 23 M. L. J. 677, dissented from.

K. V. Krishnaswami Iyer for Petitioner.

K. Bhashyam for Respondent.

Sadasiva Iyer and
Napier, JJ.
1918, March 19.

C. M. A. No. 305 of 1917.

Probate and Administration Act (V. of 1881)—S. 50, 69, & 83—Letters of administration granted to widow of deceased—will disputed

by petitioner, a minor at the time of grant—Proper procedure in contentious cases.

Letters of administration were granted to the widow of a deceased person on the strength of a will left by him. The present petitioner applied to revoke the grant on the ground that the will was not genuine and that he could not contest the original petition of the widow as he was a minor, as no citation was served upon his guardian and as no appearance was entered on his behalf. The District Judge made an order purporting to revoke the grant, and restored the original petition of the widow to file.

Held that the proper procedure in such cases to recall the letters of Administration and proceed to determine the genuinenes of the will by suit.

P. Somasundaram and *C. Rama Rao* for Appellant.

B. Narasimha Rao, K. Rajah Iyer and *A. C. Sampathi Iyengar* for Respondent.

Chief Justice and Spencer, J.
1918, March 19.

A. S. No. 72 of 1917.

Trustee—Claim to property as owner—Onus of proof—Utilisation of its rents and profits for trust purposes—Mixing up such property with trust property—Effect—Widow holding office of hereditary trustee—Conferring right of management on stranger—Possession of stranger—Nature of—Suit under S. 92, Civil Procedure Code for scheme—Rights of worshippers—Court if and how far will recognise right of stranger and his heirs.

The utilisation by a trustee of the rents and profits of a property for a long time for purposes of the trust and the mixing up by him of such property and funds along with trust funds are sufficient to shift the onus on to the trustee of proving that the property does not belong to the trust.

Where a Hindu widow holding the hereditary office of a trustee of a public temple as heir to her husband conferred upon a stranger to her husband's family authority to manage, *held*, that the act of the widow did not amount to an alienation so as to constitute the possession of the stranger adverse.

In a suit under S. 92 of the Code of Civil Procedure in respect of such a temple, the Court *held* that the possession of the stranger would not be disturbed, recognised him and his heirs as hereditary trustees and held that in the absence of any claim by the real heirs to the office, the worshippers were not entitled to question the legality of the possession of the stranger and his heirs.

T. R. Venkataama Sastriar and *M. S. Vaidiyanadhaiyar* for Appellant.

V. C. Seshachariar, P. R. Ganapathi Aiyar and *K. S. Ramabhadra Aiyar* for Respondents.

Sadasiva Iyer and Napier, JJ. 1918, March 20. — S. A. No. 821 and 822 of 1917.

Limitation Act, S. 14—*Plaint presented in wrong Court—Court recess, if saves limitation.*

When the plaint is presented in a wrong Court and returned, the recess of the Court does not save limitation, if the suit be out of time on the date it is instituted in the proper Court.

36 M. 482 followed.

A. Subbarama Iyer for Appellant.

B. Sitarama Rao and *A. Swaminatha Iyer* for Respondent.

Ayling and Coutts Trotter, JJ. 1918, March 21. — S. A. No. 903 of 1917.

Estoppel—Transferee from ostensible owner of immoveable property—Due care and caution, absence of—No estoppel—Transfer of Property Act, S. 41 if modifies and limits S. 115 of the Evidence Act.

Where a transferee of immoveable property from the ostensible owner resists a suit for possession by the real owner, on the ground of estoppel under S. 115 of the Evidence Act, it is incumbent on the transferee to prove that he exercised due care and caution in ascertaining the real nature of the title of his transferor.

11 B. L. R. 46 followed.

Quære: Whether S. 41 of the Transfer of Property Act limits and modifies the general rule of estoppel enunciated in S. 115 of the Evidence Act.

12 Bom. L. R. 457 referred to.

T. S. Ramaswami Iyer for Appellant.

A. V. Visvanatha Sastri for Respondent.

Sadasiva Iyer and Napier, JJ. 1918, March 22. — S. A. No. 945 of 1917,

Adverse possession—Right to have a tiled coping projecting over neighbour's land—if an easement.

The plaintiff brought a suit for a declaration, that he had a right to have a tiled coping on his wall adjoining the defendant's land and projecting over it, and for an injunction restraining the defendant from interfering with the enjoyment of his right. It was contended that the right in question was an easement which could be acquired only by prescribing for twenty years under S. 15 of the Easements Act.

Held, that it was not an easement and that it was a possessory right which could be acquired by adverse possession for twelve years.

P. Nagabhushanam for Appellant.

V. Ramadoss for Respondent.

Oldfield and
Krishnan, JJ.
1918, March 25.

S. A No. 1104 of 1917.

Registration Act, S. 17 cl. 2 (vi)—Suit by adopted son against widow—Compromise—No decree in terms of compromise, but compromise mentioned in petition for withdrawal of suit—Registration, if necessary.

The plaintiff, an adopted son brought a suit against the widow to declare his right as adopted son and for possession of immoveable property. The matter was compromised, and according to the compromise the plaintiff was entitled to get ¾ of the property at once and the widow was to have a life-interest in the remaining ¼. No decree was passed in terms of the compromise, but it was mentioned in the petition for the withdrawal of the suit. The widow alienated the portion that fell to her, and the present suit is for a declaration that the alienation is invalid as against the plaintiff.

Held, that as no decree was passed in terms of the compromise, the right of the plaintiff was based only on the agreement, and such agreement required registration. The mere mention of the compromise in the petition for withdrawal does not make it a " decree or order of Court " within the meaining of S. 17 cl. (2) VI of the Registration Act.

A. Sambasiva Rao for Appellant.

K. V. L. Narasimham for Respondent.

Sadasiva Iyer and
Napier, JJ.
1918, March 26.

S. A. No. 886 of 1917.

Court Fees Act, S. 7 (5) (b)—Suit for recovery of a portion of land comprised in a patta—Valuation—Market value.

Where a person sues for partition and recovery of his share of lands forming a portion of a ryotwari land but such portion is not separately registered in the revenue register as separately assessed, the Court-fee is payable on the market value of the property and not on the basis of assessment.

T. R. Venkatarama Sastri and *A. V. Visvanatha Sastri* for Appellants.

S. Subrahmanya Iyer for Respondent.

Sadasiva Aiyar and Napier, JJ. 1918, March 21. — S. A. No. 461 of 1917.

Hindu Law—Minor—Guardianship—Divided paternal uncle — Whether a natural guardian under the Hindu Law—Sale by divided paternal uncle of minor's property—Limitation Act, Art. 44 and 144.

A divided paternal uncle is not a natural guardian of his nephew under Hindu Law.

2 C. L. R. 583 ; 2 C. W. N. 191 ; 38 M 1125 ; 39 I. C. 662 foll.

A suit to recover possession of the property of a minor sold by his divided paternal uncle is not governed by Art. 44 but falls under Act. 144 of the Limitation Act.

Such a suit can be brought by an alienee of the property by the ward after attaining majority even though the ward had not set aside the sale by the uncle before alienating it to the plaintiff.

C. A. Seshagiri Sastri for the Appellant.

K. Krishnaswami Aiyangar for *G. Krishnaswami Aiyar* for the Respondents.

Ayling and Coutts Trotter, JJ. 1918, March 28. — S. A. No. 906 of 1917.

Provincial Small Cause Courts Act, Sch. ii, Arts. 18 and 31—Suit for rent by temple trustee—Former trustee impleaded as defendant, as payment to him was alleged by tenants—Suit, if one of small cause nature, and if second appeal lies.

The trustee of a temple sued for recovery of a sum of Rs. 400 and odd being the rent due from the tenants of the lands belonging to the temple. The former trustee of the temple was also impleaded as a defendant, as payment to him was alleged by the tenants. The respondent took the preliminary objection that no second appeal lay, as the suit was one of a small cause nature. It was contended for the appellant that it was a suit to make good the loss occasioned by a breach of trust on the part of the fourth defendant and so came within Art. 18 of Sch. ii of the Provincial Small Cause Courts Act, or in the alternative that it was a suit for account and came within Art. 31.

Held, that it was a mere money suit and so of small cause nature, and that no second appeal lay.

T. V. Gopalaswami Mudaliar for Appellant.

G. S. Venkatarama Aiyar and *G. S. Ramachandra Aiyar* for Respondents.

Phillips and Krishnan, JJ.
1918, April 2.
S. A. No. 1272 of 1917.

Sale to a minor—Validity of—Part of consideration—Agreement by minor to pay maintenance in future—Sale invalid.

Where under a sale deed in favour of a minor a portion of the consideration is the agreement by the minor to pay maintenance in future, such a sale is void.

There can be no obligation on a minor to do something in future as a consideration to a sale deed in his favour.

31 M. L. J. 575 distinguished.

B. Narasimha Row and *D. Appa Row* for the Appellant.

A. Raghunatha Row for the Respondents.

Oldfield, J.
1918, April 5.
C. R. P. No. 421 of 1917.

C. P. Code, O. 20, R. 11—Discretion under—Judicial—Decree directing payment of money in instalments extending over a period of five years.

The discretion vested in a court under O. 20 R. 11 to make a decree for money payable in instalments must be judicially exercised. The fact that the defendant is hard pressed is not of itself a sufficient reason to pass a decree directing payment in instalments spread over a considerable period.

11 C. L. J. 431 and 32 I. C. 608 followed.

S. Vaidyanatha Aiyar, for G. *S. Ramachandra Aiyar,* for Petitioner.

K. S. Ramabhadra Aiyar, for *P. R. Ganapathi Aiyar,* for Respondent.

Seshagiri Aiyar, J.
1918, April 5.
C. R. P. No. 80 of 1917.

C. P. Code, Ss. 63 and 73—Attachment by munsiff's court and sub-court—Assets realised by the superior court—Decree-holder in Munsiff's Court, if entitled to reteable-distribution.

Where property is under attachment by an imferior as well as a superior court and assets are realised by the superior court in accordance with S. 63 of the Code, the decree-holder in the inferior court, on application to the superior court before the receipt of assets, is entitled to rateable distribution although the decree has not been transferred to the superior court.

26 M. L. J. 406 followed.

K. S. Jayarama Aiyar for Petitioner.

T. L. Venkatarama Aiyar for Respondent.

The Chief Justice,
Sadasiva Aiyar and
Spencer, JJ.
1918, April 9.

C. C. C. A. No. 7 of 1917 (F. B.)

Fraud—Suit to set aside judgment for fraud—Judgment obtained by perjury—Maintainability of suit.

A suit does not lie to set aside a judgment on the ground that it was obtained by fraud committed by the defendant upon the court by committing deliberate perjury and by suppressing evidence.

38 M. 203 ; 16 C. W. N. 1002 ; 37 A. 535 approved, 29 M. 179 over-ruled.

K. S. Ganapathi Aiyar, for Appellant.

K. Venkatavaradachari, for Respondent.

The Chief Justice,
Sadasiva Iyer
and Spencer, JJ.
1918, April 11.

L. P. A. No. 3 of 1918.

Malabar Law—Stani—Power to grant long lease enuring beyond his life-time—validity of lease—Burden of proof.

A person who alleges that an alienation by a stani beyond his life-time is binding on his successor is bound to show that the alienation is for a binding purpose.

The case is analogous to the case of an alienation by a manager of a joint Hindu family.

C. V. Ananthakrishna Aiyer, for Appellants.

A. Sundaram, for Respondents.

Abdur Rahim and
Seshagiri Iyer. JJ.
1918, April 15.

C. M. S. A. No. 15 of 1916.

Limitation Act Art. 182 (5)—*Payment of batta continuing sale —Whether an application for a step-in-aid of execution.*

Where a judgment-debtor applied in Court for the adjournment of the sale when it was going on and the Court ordered the sale to stand over for 4 days if proper batta was paid and on the next day the decree holder paid batta for the amin continuing the sale for one more day. *Held,* that the payment of batta cannot be considered an application for a step-in-aid of execution.

S. Ramaswamy Iyer for T. V. Muthukrishna Iyer and *N. Muthuswami Iyer* for the Appellant.

P. R. Ganapathi Iyer for the Respondents.

The Chief Justice, Oldfield, Sadasiva Iyer, Spencer and Bakewell, JJ. 1918, April 17.

(Full Bench).
S. A. No. 1824 of 1916.

Grant by Government of land bounded by non-navigable river—Half the bed of the river passes by—Presumption.

Where a grant by the Government is made in India of land described as bounded by a non-navigable river there is a prima facie presumption that half of the bed of the river passed under the grant. It may be strong or weak according to the circumstances.

T. V. Venkatrama Iyer and R. Rajagopala Iyer for the Appellants.

The Government Pleader for the Respondent.

Sadasiva Iyer and Spencer, JJ. 1918, April 17.

C. M. S. A. No. 95 of 1916.

T. P. Act, Ss. 88 and 89—C. P. Code, Act V. of 1908, O. 34 Rr. 4 and 5—Decree for sale passed under the T. P. Act— Time for payment expiring after the new C. P. Code coming into force—Whether an application for final decree necessary—Application for order absolute —Limitation applicable—Lim. Act, Art. 181 and 182.

Where a decree for sale on a mortgage was passed under S. 88 of the T. P. Act on the 16th of July 1908 and the time fixed by the decree for payment of the amount expired on the 16th January 1909, the decree-holder has the remedy of applying in execution for an order absolute under S. 89 of the T. P. Act after the expiry of the time prescribed. The new Civil Procedure Code, O. 34 R. 5 does not apply. So the decree holder has not to apply for a final decree. Such an application is governed by Art. 182 of the Limitation Act observations in 32 M. L. J. 455 dissented from.

K. V. Sesha Iyengar for the Appellant.

C. A. Seshagiri Sastri for *K. V. Krishnaswami Iyer* for the Respondents.

Ayling and Coutts-Trotter, JJ. *1918, April 16.* — S. A. No. 63 of 1917.

Limitation—Principal and agent—Accounts—Agent for the sale of nuts—Price realised by sale to be paid by honouring hundies drawn upon the agent by the principal—Agreement by principal to pay deficit—Cause of action, when arises.

The plaintiff was the Commission Agent of the defendant for the sale of areca nuts consigned by defendant from Singapore. The arrangement between the plaintiff and the defendant was, that by way of payment of the price realised by the sale of the nuts, the plaintiff should honour the hundies drawn by the defendant and the deficiency that may arise by the sale proceeds not covering the moneys paid in honouring the hundies was to be paid by the defendant. The consignment of nuts was in the years 1906 and 1907. The last consignment was sold in 1910, and the plaintiff brought a suit for the excess of money paid by him in honouring the hundies over the amount realised by sale. The suit was within 3 years of the sale of the last lot. It was contended for the defendant-appellant that the cause of action for the plaintiff arose on the payment of each hundi and that the suit was barred under Art. 61 of the Limitation Act.

Held, that the plaintiff continued to be a Commission Agent even after payment of each hundi, and that the arrangement between the plaintiff and the defendant was in the nature of a running account between them, and that the suit was not barred by limitation as it was brought within three years of the last lot.

A. Ramachandra Iyer and *P. N. Nageswara Iyer* for the Appellant.

S. Rangachariar for *G. S. Ramachandra Iyer* for the Respondent.

Abdur Rahim and Napier, JJ. *1918, April 19.* — S. A. No. 1199 of 1917.

Hindu law—Sale of family property by father—Suit by father to set aside sale on the ground of want of consideration—Possession given to vendee on payment of consideration—Subsequent suit by sons to set aside alienation on the ground of no legal necessity—Debt created by sale, if an antecedent debt for which sons are liable.

A Hindu father sold the family property to the defendant. Soon after the sale, he brought a suit to set aside the sale on the ground that no consideration passed. Possession was given to the vendee on his paying the consideration agreed upon. The sons, e.g., the alienors now brought a suit to set aside the alienation so far as their shares were concerned on the ground that there was no necessity for the sale.

The question was whether the consideration for the sale was an antecedent debt of the father which the sons were under a pious duty to discharge.

Held, that as the debt itself was created by the sale, it could not be considered as an antecedent debt for which the sons were liable.

T. V. Venkatarama Iyer and *R. Ragagopala Iyer* for the Appellants.

T. Prakasam for the Respondent.

Seshagiri Iyer and Napier, JJ.
1918, April 22.
S. A. No. 1062 of 1917.

Limitation Act, S. 19 and Arts. 106 and 120—Accounts between partners—Liability on basis of accounts—Reference to arbitration—If an acknowledgment of liability—Suit for dissolution of partnership—Limitation.

Two partners after the partnership business ceased to be carried on, could not agree as to the liability of each to the other on the basis of accounts. They referred their dispute to arbitration, and unconditionally agreed to abide by the decision of the arbitrators. In a suit subsequently brought by one partner against the other, the question was whether the reference to arbitration amounted to an acknowledgment of liability and as such saved limitation.

Held, that the reference was a conditional acknowledgment which would be available for saving limitation only if the condition was fulfilled by the arbitrators giving the award and the parties acting on the same, 33 Cal. 1047 (P.C.) referred to.

Further held, that in the absence of evidence to show that there was any dissolution of partnership, Art. 106 of the Limitation Act did not apply and that the suit must be treated as one for dissolution of partnership and accounts which was governed by Art. 120.

G. S. Ramachandra Iyer, for Appellant.

C. V. Ananthakrishna Iyer, for Respondent.

Seshagiri Iyer and Napier, JJ.
1918, April 22.
S. A. No. 913 of 1916.

Evidence Act, S. 13—Lawyer's notice by mortgagor to mortgagee intimating his intention to redeem the mortgage—if evidence of subsisting right to redeem.

A registered Lawyer's notice issued to the mortgagee by the mortgagor intimating his intention to redeem the mortgage and calling upon the mortgagee to accept the mortgage money is *prima facie* evidence of a subsisting right in the mortgagor to redeem the mortgage.

K. Srinivasa Iyengar and *B. Pocker* for Appellant.

C. Madhavan Nair for Respondent.